Bank Bumiputra (M) Bhd v Cheong Yoke Choy (Malaysian Central Depository Sdn Bhd, proposed intervener)

HIGH COURT (JOHOR BAHRU)—CIVIL SUIT NO 22-231 OF 1998
ABDUL MALIK ISHAK J
28 JANUARY 2000

Civil Procedure *— Parties — Intervention — Proposed intervener had failed to obey court order — Whether conditions for intervening fulfilled*

The defendant was an employee of the plaintiff who was alleged to have misappropriated some RM11m belonging to the plaintiff and the plaintiff's customers. The plaintiff instituted this action and obtained Mareva injunctions, Anton Piller orders and charging orders. A copy of each of these orders was served on the proposed intervener ('MCD') with a request for 'complete information on shares held by the defendant and to prevent any transactions from being transacted thereon'. MCD informed the plaintiff that the release of the information required would be a contravention of MCD's enabling Act and proposed instead that the plaintiff apply to freeze the defendant's shares. The plaintiff applied to freeze the shares only to be told that a court order naming MCD and specifically to that effect was required. MCD applied to intervene and for a variation of the orders, insofar as they applied to MCD as compliance with the orders would result in the contravention of a statute. MCD argued that this was to achieve its objectives, as it was essential that strict confidentiality be maintained in the trading and ownership of shares.

Held, dismissing the intervener's application:

(1) Before a party may intervene, it must have an interest directly related to the subject matter of the action. By their own admission MCD had conceded that they had no interest or involvement in the dispute or in the shares owned by the defendant (see pp 358H–360C).

(2) Although the orders had been served on MCD as early as May 1998, MCD had only sought to intervene in July 1999, a delay of more than a year. In spite of an order, referring to MCD by name, having since been served on them, MCD had the audacity to thumb its nose to the order and had refused to obey it for more than two months, up until the present date (see pp 352F–353A).

(3) Before filing an application to intervene, a proposed intervener must obey the orders of the court as relate to it. Failure to do so could constitute a contempt of court (see p 353C–E).

(4) A court order would be a legitimate excuse for breaking confidence as the party would be bound by law to make the disclosure. No action would lie against such a party in respect of

such a disclosure. The veil of secrecy is clearly superficial (see p 362H–365F). A

(5) That a court has power to order disclosure can never be doubted. There are no statutory provisions which prohibit the High Court from ordering disclosure. Nowhere in the enabling Act is there a provision preventing the court from ordering disclosure (see p 366E–F). B

[Bahasa Malaysia summary

Defendan seorang perkerja plaintif yang telah didakwa menyalahgunakan barang hakmilik plaintif dan pakaian plaintif berjumlah RM1j. Plaintif telah memulakan tindakan ini dan mendapatkan injunksi-injunksi Mareva, perintah-perintah Anton Piller dan perintah-perintah dakwaan. Setiap salinan perintah-perintah berikut telah disampaikan ke atas pencelah yang dicadangkan ('MCD') dengan satu permintaan untuk 'maklumat lengkap syer-syer yang dipegang oleh defendan dan untuk menghalang apa-apa transaksi daripada berlaku'. MCD telah memaklumkan plaintif bahawa penyiaran maklumat yang dikehendaki adalah satu penyanggahan kepada Akta MCD dan mencadangkan sebaliknya agar plaintif memohon untuk membekukan syer-syer defendan. Plaintif telah memohon untuk membekukan syer-syer tersebut hanya untuk diberitahu bahawa satu perintah mahkamah yang menamakan MCD dan secara khusus setakat itulah yang dikehendaki. MCD telah memohon untuk campur tangan dan untuk satu pelbagaian perintah, setakat mana mereka telah pohon kepada MCS sebagai mematuhi perintah-perintah akan mengakibatkan penyangghan satu statut. MCD menghujahkan bahawa cara ini adalah untuk mencapai objektif-objektifnya, kerana ia adalah penting agar kerahsiaan dikekalkan di dalam dagangan dan pemilikan syer-syer. C D E F

Diputuskan, menolak permohonan pencelah tersebut: G

(1) Sebelum satu pihak boleh campur tangan, ia mestilah mempunyai kepentingan langsung berkaitan dengan perkara pokok tindakan. Dengan pengakuan MCD sendiri telah mengakui bahawa mereka tiada kepentingan atau penglibatan di dalam pertikaian atau syer-syer yang dimiliki oleh defendan (lihat ms 358H–360C). H

(2) Walaupun perintah-perintah tersebut telah disampaikan ke atas MCD seawal bulan Mei 1998, MCD hanya memohon untuk campur tangan pada bulan Julai 1999, satu kelewatan lebih setahun. Meskipun satu perintah, yang merujuk MCD dengan nama, telahpun disampaikan ke atas mereka, MCD mempunyai keberanian untuk tidak mengendahkan perintah tersebut dan enggan mematuhinya lebih daripada dua bulan, sehingga tarikh ini (lihat ms 352F–353A). I

(3) Sebelum memfailkan satu permohonan untuk campur tangan, pencelah yang dicadangkan mestilah mematuhi perintah-perintah mahkamah yang berhubung dengannya. Kegagalan untuk berbuat demikian akan membentuk satu penghinaan mahkamah (lihat ms 353C–E).

(4) Satu perintah mahkamah adalah satu alasan perundangan untuk mematahan keyakinan kerana pihak yang terikat dengan undang-undang untuk membuat pendedahan. Tiada tindakan yang dimulakan terhadap suatu pihak berhubung dengan satu pendedahan. Selubung kerahsiaan tersebut adalah jelas superfisial (lihat ms 362H–365F).

(5) Di mana mahkamah mempunyai kuasa untuk memerintahkan pendedahan tidaklah boleh diragukan. Tiada peruntukan statutori yang menghalang Mahkamah Tinggi daripada memerintahkan pendedahan. Tiada terdapat di dalam Akta suatu peruntukan yang menghalang mahkamah daripada memerintahkan pendedahan tersbeut (lihat ms 366E–F).]

Notes

For cases on intervention of parties, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3278–3295.

Cases referred to

A & M Records Inc & Ors v Darakjian & Anor [1975] 3 All ER 983 (refd)

Abdul Rahman v Abu Taha [1980] 3 All ER 409 (refd)

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)

A-G of Hong Kong, The v Zauyah Wan Chik & Ors [1995] 3 CLJ 35 (refd)

Al Nahkel for Contracting and Trading Ltd v Lowe [1986] 1 All ER 729 (refd)

Anton Pillar KG v Manufacturing Processes Ltd [1976] 1 All ER 779 (refd)

Arab Malaysian Merchant Bank Bhd v Jamaluddin bin Dato Mohd Jarjis [1991] 2 MLJ 27 (refd)

Arataki Honey Ltd v Minister of Agriculture & Fisheries [1979] 2 NZLR 311 (refd)

Asia Television Ltd v Viva Video Sdn Bhd [1982] 2 MLJ 304 (refd)

Bankers Trust Co v Shapira & Ors [1980] 3 All ER 353 (refd)

Bagnall v Carlton (1877) 6 Ch D 130 (refd)

Bayer AG v Winters & Ors [1986] 1 All ER 733 (refd)

Blaydes v Calvert (1820) 2 Jac & W 211 (refd)

Bolland v Young [1904] 2 KB 824 (refd)

Canada Sugar Refining Co v The Queen [1898] AC 735 (refd)

Cock v Ravie (1801) 6 Ves 283 (refd)

Coramas v Rakyat First Merchant Bankers Bhd & Anor [1994] 1 AMR 8 (refd)
Colverson v Bloomfield (1885) 29 Ch D 341 (refd)
Duke of Buccleuch, The [1892] P 201 (refd)
Etches v Lance (1802) J Ves 417 (refd)
Ets Esefka v Central Bank of Nigeria [1979] 1 Lloyds Rep 445 (refd)
Cretanor Maritime Co Ltd v Irish Marine Management [1978] 3 All ER 164 (refd)
Daniel v Furguson [1891] 2 Ch 27 (refd)
Dixon v British Broadcasting Corp [1979] 2 All ER 112 (refd)
Emanuel v Emanuel [1982] 1 WLR 669 (refd)
Finney v Hinde (1879) 4 QBD 102 (refd)
Gill v Continental Union Gas Co (1872) LR 7 Ex 332 (refd)
Hong Leong Finance Bhd v Staghorn Sdn Bhd [1995] 2 MLJ 847 (refd)
Howitt Transport v Transport and General Workers Union [1973] 1 CLR 10 (refd)
Hwang Ju-in v Huang Han Choo [1977] 2 MLJ 229 (refd)
Hyde v Whitfield (1815) 19 Ves 342 (refd)
Jackson v Normanby Bank Co [1899] 1 Ch 438 (refd)
Jones v Alephsin (1810) 16 Ves 470 (refd)
Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Kennard v Cory Brothers Co Ltd [1922] 1 Ch 265 (refd)
Laguna v Service Hotels Ltd [1969] 2 Ch 209 (refd)
Lee Meow Lim v Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn Bhd, Intervener) [1990] 3 MLJ 123 (refd)
Lian Keow Sdn Bhd v C Paramjothy & Anor [1982] 1 MLJ 217 (refd)
Lim Nyook Yin v Untratech Sdn Bhd & Anor [1995] 1 AMR 183 (refd)
Locabail International Finance Ltd v Agroexport [1986] 1 All ER 901 (refd)
Mareva Cia Nav v International Bulkcarriers [1975] 2 Lloyd's Rep 509 (refd)
Montecchi v Shimco [1979] 1 WLR 1180 (refd)
Morris v Crown Office [1970] 2 QB 114 (refd)
Norwich Pharmacal Co v Commissioners of Customs and Excise [1972] RPC 743 (refd)
Orwell Steel Ltd v Asphalt and Tarmac (UK) Ltd [1985] 3 All ER 747 (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52 (refd)
Rainbow v Moorgate Properties Ltd [1975] 2 All ER 821 (refd)
Rank Film Ltd v Video Information Centre [1982] AC 380 (refd)
Roberts v Holland [1893] 1 QB 665 (refd)
Roberts Petroleum Ltd v Bernard Kenny Ltd (in liquidation) [1982] 1 All ER 685 (refd)
Robinson v Bailey [1941-42] Ch 268 (refd)
Sanders Lead Co Inc v Entores Metal Brokers Ltd [1984] 1 WLR 452 (refd)

Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors [1990] 3 MLJ 254 (refd)
Shepherd Homes Ltd v Sandham [1970] 3 All ER 402 (refd)
Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor [1997] 1 MLJ 690 (refd)
South Western Loan & Discount Co Ltd v Robertson 8 QBD 17 (refd)
Spokes v Banbury Board of Health (1865) LR 1 Eq 42 (refd)
Stewart Chartering v C & O Management SA, The Venus Destiny [1980] 1 All ER 718 (refd)
Strelley v Pearson (1880) 15 Ch D 113 (refd)
Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd [1998] 4 MLJ 275 (refd)
Third Chandris Shipping Corp & Anor v Unimarine SA [1979] 2 All ER 972 (refd)
Thomas M Haysek v Boyden World Corp [1989] 1 MLJ 219 (refd)
Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 1 MLJ 63 (refd)
Tomlinson v Harrisson (1802) 8 Ves 32 (refd)
Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668 (refd)
Underwood, Re, Re Bowles, U v W (1903) 51 WR 335 (refd)
United Asian Bank Bhd v The PR of Roshammah (deceased) & Ors [1994] 3 MLJ 327 (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor [1993] 2 MLJ 217 (refd)
Wee Thiang Kheng & Ors v Ngu Nii Soon & Ors [1989] 1 MLJ 252 (refd)
Widgery v Tepper (1877) 6 Ch D 364 (refd)
Z Ltd v A [1982] 1 All ER 556 (refd)

Legislation referred to

Securities Industries (Central Depository) Act 1991 s 5

Ibrahim Hashim (*Hassan Ibrahim & Co*) for the plaintiff.
Lambert Rasa-Ratnam (*DP Naban* and *Adlin Abdul Majid* with him) (*Lee Hishamuddin*) for the defendant.

Abdul Malik Ishak J:

Enclosure 28

This was an application by way of a summons in chambers by the proposed intervener for the following orders:

(1) that the proposed intervener be granted leave to intervene and be made a party to this action and to take part in this action for the purpose of setting aside or of varying the orders of this honourable court made on 23 May 1998 (encl 7), 1 June 1998 (encl 12) and 18 May 1999 (encl 30) respectively ('the orders');

(2) that the title of the proceedings be amended in subsequent proceedings in this action to include the name of the proposed intervener as intervener, such other title as this honourable court deems fit;

(3) that the orders be set aside or varied in so far as they concern the proposed intervener and in so far as they have directed the proposed intervener to provide the plaintiff with complete information on the shares held by the defendant;

(4) that the costs incidental to this application be taxed and paid forthwith by the plaintiff; and

(5) such other and further relief as this honourable court deems fit.

The grounds of the application were said to be, inter alia, in the following terms:

(a) the proposed intervener has been directly affected by the granting of the orders; and

(b) compliance with the orders would result in a contravention of a statute, to wit, the Securities Industry (Central Depository) Act 1991.

Enclosure 28 was supported by an affidavit of Benothini a/p Bascaran ('Benothini') that was affirmed on 21 July 1999 as seen in encl 27. Benothini affirmed that affidavit in her capacity as the senior legal officer of the proposed intervener and she deposed that she was duly authorised by the proposed intervener to affirm the affidavit on its behalf. She also deposed that the facts advanced in the affidavit were within her own personal knowledge save as otherwise stated. She then craved leave of the court to refer to the orders. She deposed that by the orders, the proposed intervener was required to provide the plaintiff with a complete information on the shares held by the defendant. Benothini deposed further and alluded to the fact that the proposed intervener was said to be a company approved by the Minister of Finance under s 5 of the Securities Industry (Central Depository) Act 1991 to establish and operate a system for the central handling of securities whether or not listed on any stock exchange and to provide other facilities and services incidental thereto. Benothini deposed further and said that in the proposed intervener's operation, all securities were deposited with and held in custody by, or registered in the name of the proposed intervener or its nominee company for the depositors, and the dealings in respect of those securities were effected by means of entries in securities amounts without the physical delivery of scrips. It was further deposed that under the proposed intervener's operation it permitted and facilitated the settlement of securities transactions or dealings in securities without the physical delivery of scrips. To achieve these objectives it was said that it was essential, subject to exceptions, that strict confidentiality be maintained on trading and ownership of securities. It was for these reasons, so said Benothini, that s 43 of the Securities Industry (Central Depository) Act, 1991 was enacted. Benothini categorically deposed that the securities in the name of the defendant deposited with and held in the custody of the proposed intervener were securities listed on the Kuala Lumpur Stock

Exchange ('KLSE'). Benothini deposed that she was advised by the proposed intervener's solicitors and she verily believed that since under the orders the proposed intervener was to provide the plaintiff with complete information about the shares held by the defendant, then the orders were said to contravene the written law, to wit, s 43 of the Securities Industry (Central Depository) Act 1991. She deposed that there were exceptions to s 43 of the Securities Industry (Central Depository) Act 1991 as set out in s 45 thereof but she deposed that these exceptions were not applicable to the orders. For these reasons, Benothini prayed for an order in terms of the proposed intervener's application in encl 28.

The plaintiff responded to the affidavit of Benothini through Mohd Eunos bin Haji Ali ('Eunos') who affirmed an affidavit in reply in encl 34 on 2 August 1999. In encl 34, Eunos categorically denied all the paragraphs in the affidavit of Benothini. Eunos deposed that he was advised and he verily believed that on 18 May 1999, the court ordered as seen in encl 30 the proposed intervener to provide the plaintiff with a complete information on the shares held by the defendant and to prevent the proposed intervener from conducting any transaction on those shares in order to safeguard the interest of the plaintiff as the plaintiff was anxious to satisfy the judgment which they obtained against the defendant on 27 November 1998. The judgment which the plaintiff obtained against the defendant on 27 November 1998 can be seen in encl 21 and it was worded, in its original text, as follows:

> Tiada kehadiran telah dimasukkan oleh defendan dalam tindakan ini. Adalah pada hari ini dihakimkan bahawa defendan hendaklah membayar kepada plaintif gantirugi khas sebanyak Ringgit Malaysia sebelas juta dan sembilan puluh tujuh ribu (RM11,097,000) sahaja berserta dengan faedah pada kadar 8% setahun di atas jumlah penghakiman dari tarikh writ saman iaitu 19 haribulan Mei, 1998 sehingga pembayaran atau penjelasan yang sepenuhnya berserta kos yang akan ditetapkan.

Eunos deposed that he was further advised to say that the plaintiff's solicitors have since written to Messrs Eng Securities Sdn Bhd enclosing the two court orders dated 23 May 1998 (encl 7) and 1 June 1998 (encl 12) and explaining the contents and purport of the court order dated 23 May 1998 (encl 7). That letter was dated 11 September 1998 and it was worded as follows:

> Hassan Ibrahim & Co
> Advocates & Solicitors Peguambela & Peguamcara
>
> Our Ref: HI AD BBMB JB 3302/98
>
> Friday 11 September 1998
>
> The Manager
> Eng Securities Sdn Bhd
> 95 Jalan Tun Abdul Razak
> 80000 Johor Bahru
>
> VERY URGENT
> BY HAND
>
> Dear Sir

Re: Johor Bahru High Court
CIVIL SUIT NO 22-231-1998 (1)
BBMB JB v Cheong Yoke Choy
(NRIC NO 4760742 OLD) (550324-10-5981 new)

We are the Solicitors for Bank Bumiputra Malaysia Bhd of 51, Jalan Segget, 80000 Johor Bahru.

We are instructed by our client to refer their letter dated 22 August 1998 addressed to you. Further to the said letter, we enclose herein two (2) Court orders dated 23 May and 1 June 1998 by way of service on you.

Please refer para 5 (A) p 3 of the Order of 23 May 1998:

Our client has obtained an interim injunction against the defendant namely Cheong Yoke Choy (Nric No 4760742 old 550324-10-5981 new) restraining him and/or his agent, and/or his representative(s) and/or his servant and/or his family members from disposing any of his movable and/or immovable assets in Malaysia until the final disposal of the pending suit.

It has also been ordered that you are to disclose to us as Solicitors for the plaintiff, full particulars of your knowledge of any movable and/or immovable properties held in favour of the defendant by you as soon as possible.

The said order was extended vide another Court Order dated 1 June 1998 which we also enclose for your perusal. We are made to understand by our client that the said Cheong Yoke Choy has an assortment of 5,000 lots of shares in about thirty (30) counters with you.

In the premises, kindly comply with the Court Order by providing us the full particulars of shares held by the abovenamed, the current value etc as our client is in the process of obtaining judgment against the defendant and subsequently apply to Court to have the said assets disposed accordingly to recover the amount due and owing to them.

Thank you very much.

Yours faithfully,

Sgd (Illegible)
Encl
cc (1) Branch Manager, BBMB JB
(2) Area Manager, BBMB JB
(3) Legal Manager, BBMB KL
VIA FAX ONLY

Eunos then proceeded to depose that he was advised to say that the plaintiff's solicitors had on 14 September 1998 sent a reminder to Messrs Eng Securities Sdn Bhd on the same subject matter and on the same date the plaintiff's solicitors too had written to the proposed intervener and suggested that the defendant's shares be frozen and that the proposed intervener to supply the details of the shares held by the defendant to the plaintiff. The letter dated 14 September 1998 to the proposed intervener was worded as follows:

Hassan Ibrahim & Co,
Advocates & Solicitors Peguambela & Peguamcara

Our Ref: HI AD BBMB JB 3302/98

A Monday 14 September 1998

Executive Director
Malaysian Central Depository S/B
6th Floor, Exchange Square
Bukit Kewangan
50200 Kuala Lumpur
B VERY URGENT
VIA COURIER

Dear Sir

Re: Johor Bahru High Court
C Civil Suit No 22–231–1998 (1)
BBMB JB v Cheong Yoke Choy
(NRIC NO 4760742 old) (550324-10-5981 new)

We are the Solicitors for Bank Bumiputra Malaysia Bhd of 51, Jalan Segget, 80000 Johor Bahru.

D Our client has obtained a Mareva Injunciton against the abovenamed person. We enclose a copy of the Court Order dated 23 May and 1 June 1998 for your kind attention.

We write to you to enquire whether the abovenamed person held any shares in any Securities firm in Malaysia. We shall be obliged if you could provide us full particulars of the shares (if any) held by the abovenamed E person.

Pursuant to the said Order the defendant and/or his agent has been restrained and/or his representative(s) and/or his servant and/or his family members from disposing any of his movable and/or immovable assets in Malaysia until the final disposal of the pending suit.

F It has also been ordered that you are to disclose to us as Solicitors for the Plaintiff, full particulars of your knowledge of any movable and/or immovable properties held in favour of the defendant by you as soon as possible.

The said Order was extended vide another Court Order dated 1 June 1998 which we also enclose for your perusal. It has come to our client's knowledge that the abovenamed has an assortment of 5,000 lots of shares with G Eng Securities Sdn Bhd, Johor Bahru.

In the meantime, kindly comply with the Court Order by providing us the full particulars of shares held by the abovenamed, the current value etc as our client is in the process of obtaining judgment against the defendant and subsequently apply to Court to have the said assets disposed accordingly to recover the amount due and owing to them.

H Thank you very much.

Yours faithfully,

Sgd (Illegible)
Encl
cc (1) Branch Manager, BBMB JB
I (2) Area Manager, BBMB JB
(3) Legal Manager, BBMB KL
VIA FAX ONLY

Eunos was also advised to say that on 21 September 1998 the proposed intervener wrote a letter to the plaintiff's solicitors conveying the message that the proposed intervener could not divulge information pertaining to the affairs of the defendant and suggested that the plaintiff's solicitors to write to them and request that the defendant's account be suspended. The letter dated 21 September 1998 was worded in this manner.

MALAYSIAN CENTRAL DEPOSITORY SDN BHD
(A Subsidiary of KLSE)

Your Ref: HI AD BBMB JB 3302/98

Our Ref: LR/1/1/COMP A

21 September 1998

Hassan Ibrahim & Co
Suite 508, 510 Tingkat 5
Merlin Tower, Jalan Meldrum
80000 Johor Bahru.

Dear Sirs,

Re: Johor Bahru High Court
Civil Suit No 22–231–1998(1)
BBMB JB v Cheong Yoke Choy
[NRIC No 4760742 old) (550324-10-5981 new)

We refer to the above matter and to the teleconversation with your En Adnan on even date.

Please be informed that we are unable to accede to your request in para 3 of your letter as we are bound by the secrecy provision (Section 43) in the Securities Industry (Central Depository) Act 1991 which states that we shall not divulge, disclose or reveal any information relating to the affairs of any of the depositors.

We may divulge information according to s 45 of the Securities Industry (Central Depository) Act 1991 if the reason falls within that which are classified as permitted disclosures. We regret to inform you that your request does not fall within the permitted reasons.

We suggest, instead, that your goodselves write to us requesting that we suspend the account pursuant to para 5A of the order of Court. Rule 36.02 (i) of the rules of the Central Depository empowers us to do the same.

The relevant sections and rule have been enclosed herein for your easy reference.

Yours faithfully,

MALAYSIAN CENTRAL DEPOSITORY SDN BHD
Sgd (Illegible)
Ahmad Aznan Nawawi
Senior Manager
Corporate Affairs, Legal And Compliance

So the plaintiff's solicitors acted as advised and wrote a letter to the proposed intervener requesting that the defendant's account be suspended. The letter was dated 3 December 1998 and it was worded thus:

Hassan Ibrahim & Co,
Advocates & Solicitors Peguambela & Peguamcara

Your Ref: LR/1/1/COMP A

Our Ref: HI AD BBMB JB 3302/98

Thursday 3 December 1998

Senior Manager
Malaysian Central Depository S/B
Corporate Affairs, Legal
And Compliance
6th Floor Exchange Square
Bukit Kewangan
50200 Kuala Lumpur
(Attn En Ahmad Aznan Nawawi)
VERY URGENT
VIA FAX: 03/206 3722/POST

Dear Sir

Re: Johor Bahru High Court
Civil Suit No 22–231–1998 (1)
Bbmb Jb v Cheong Yoke Choy
(Nric No 4760742 old) (550324-10-5981 new)

We refer your letter dated 21 September 1998.

Kindly be advised that we have obtained Judgment in respect of the above person. We are now in the process of filing the necessary application in Court regarding the enforcement of the said judgment.

We now write to you requesting suspension of the abovenamed Defendant's account pursuant to Rule 36.02 of the Rules of the Central Depository.

We shall serve on you the necessary garnishment papers shortly.

Thank you.

Yours faithfully,

Sgd (Illegible)
cc: Branch Manager
Bank Bumiputra Malaysia Bhd
51 Jalan Segget
80000 Johor Bahru
(Your ref: JBRU/MEHA/cash/hi/98)

Eunos then deposed that he was advised to say that on 16 December 1998 the proposed intervener wrote a letter to the plaintiff's solicitors and intimated that they required a court order before they could comply with the plaintiff's solicitors request. The letter dated 16 December 1998 was quite straightforward and it was worded in this way:

MALAYSIAN CENTRAL DEPOSITORY SDN BHD
A Subsidiary of KLSE

Your Ref: HI AD BBMB JB 3302/98

Our Ref: LR/VT/1/1

16th December 1998

Hassan Ibrahim & Co
Suite 508, 510
5th Floor Merlin Tower
Jalan Meldrum
80000 Johor Bahru

Dear Sirs,

Re: Johor Bahru High Court
Civil Suit No 22–231–1998
Bbmb Jb v Cheong Yoke Choy

We refer to the above matter and to your letter dated 3 December 1998. Please be informed that pursuant to Rule 36.02 (i) of the Rules of Malaysian Central Depository, the Central Depository may specify a deposited security as under suspense only when the Central Depository has been served with an order of a court prohibiting any dealing in respect of a deposited security.

As such we are unable to accede to your request until the necessary papers are served on us.

Yours faithfully,

MALAYSIAN CENTRAL DEPOSITORY SDN BHD
Sgd (Illegible)
Ahmad Aznan Nawawi
Senior Manager
Corporate Affairs, Legal and Compliance.
VT/C; LET/HASSANI/16.12.98/4.44

The reply from the plaintiff's solicitors was quite swift. By letter dated 23 December 1998 the plaintiff's solicitors drew the attention of the proposed intervener to the court order dated 23 May 1998 as seen in encl 7 and that letter was worded thus:

Hassan Ibrahim & Co
Advocates & Solicitors Peguambela & Peguamcara

Your Ref: LR/VT/1/1

Our Ref: HI AD BBMB JB 3302/98

Wednesday 23 December 1998

Senior Manager
Corporate Affairs, Legal & Compliance
Malaysian Central Depository Sdn Bhd
6th Floor, Exchange Square
Bukit Kewangan
50200 Kuala Lumpur
(Attn. En Ahmad Aznan Nawawi)
VERY URGENT

Dear Sir,

Re: Johor Bahru High Court
Civil Suit No 22-231-1998
Bbmb Jb v Cheong Yoke Choy

Reference is made to your letter dated 16 December 1998 received on 22 December 1998. We have vide our letter dated 14 September 1998 duly served on you the sealed copy of the Order of Court dated 23 May 1998 (it should be 26 May 1998) and 1 June 1998 respectively.

If you could note p 5 para C of the Order dated 23 May 1998 (it should be 26 May 1998) it clearly states that you are to disclose to us the full particulars of the assets of the defendant held by you.

We shall prepare and serve on you the necessary charging order pursuant to O 50 of the Rules of the High Court upon receiving the particulars requested.

We look forward to your early response.

Thank you.

Yours faithfully,
Sgd (Illegible)
cc (1) Branch Manager- Relief
Bank Bumiputra Malaysia Bhd
51 Jalan Segget
80000 Johor Bahru

(Your ref: JBRU/MEHA/cash/hi/98)

(2) Area Manager
Bank Bumiputra Malaysia Bhd
39-02, 41-02 & 43-02
Jalan Permas Sepuluh 2
Permas Jaya
81750 Johor Bahru

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In quick succession by letters dated 1 April 1999, 9 June 1999 and 18 June 1999, the plaintiff's solicitors wrote to the proposed intervener and drew the latter's attention to the need to suspend the defendant's account and that the sealed order of the court would be served on them in due course. These three letters were exhibited in the affidavit in reply of Eunos in encl 34 and they were marked as exhs 'P9', 'P10' and 'P11' respectively.

It was deposed by Eunos to the effect that the proposed intervener had ample notice of the plaintiff's intentions and that the proposed intervener's application to intervene in encl 28 was made too late in the day, was unreasonable and was designed to prevent the plaintiff from enjoying the fruits of the orders.

It was also deposed that ss 43 and 45 of the Securities Industry (Central Depository) Act 1991 cannot be read in isolation but should be read together as a whole and when so read the disclosures which the plaintiff sought would be made available. Only the courts have the jurisdiction to decide decisively on the matter. Eunos reiterated that the plaintiff has yet to

benefit from the judgment which they had obtained from the defendant and the matter was confounded further by the ever increasing costs and interest. For the above mentioned reasons, the plaintiff craved the court to reject the defendant's application in encl 28 with costs and the plaintiff also prayed that the orders be confirmed and the proposed intervener be directed to obey the orders forthwith.

Eunos's affidavit in reply in encl 34 was not replied by the defendant at all. Enclosure 34 stood alone unrebutted by the defendant and this must be construed in favour of the plaintiff.

The orders

All the three orders in encl 7, 12 and 30 arose out of the misdeeds of the defendant. As an employee of the plaintiff, the defendant was in charge of the counter supervision and cash management and whilst holding these positions of trust the defendant committed fraud, breach of trust and conversion to such an extent that the plaintiff had to resort to these court proceedings. Between the month of May 1997 till 30 April 1998, the defendant slowly but surely siphoned monies belonging to the plaintiff and/or the plaintiff's customers to the tune of RM11,097,000. There were falsification of documents pertaining to the transferring of monies from one branch to another within the plaintiff's organisation. It was said that the plaintiff had the necessary proof to show where these monies went to. On 29 April 1998, the defendant did not turn up for work and a check at the defendant's last known address proved futile. It seemed that the defendant and his family members had taken flight —leaving the country with his ill-gotten gains. In the meantime the plaintiff had lodged a police report vide JBR 12676/98. By way of a summons in chambers the plaintiff sought for a mareva injunction supplemented with an anton piller order and on 23 May 1998, I granted the orders sought for and those orders have since been perfected as reflected in encl 7. The orders which I granted in encl 7 were worded in these ways:

(A) Suatu injunksi dikeluarkan menghalang defendan dan/atau agen-agennya dan/atau wakil-wakilnya dan/atau pekerja-pekerjanya dan/atau pegawai-pegawainya dan/atau mana-mana Bank dan mana-mana Institusi Kewangan di Malaysia dan/atau ahli keluarga defendan dan/atau mana-mana pihak yang ada urusan dengan defendan yang keatasnya diserahkan perintah ini yang berkuasa dan/atau mempunyai kuasa dan/atau kawalan keatas kesemua harta-harta boleh alih dan/atau tidak boleh alih defendan adalah ditegah dan ditahan sama sekali daripada melupuskan harta-harta defendan sehingga kes tindakan ini diputuskan atau secara alternatifnya;

(B) Suatu injunksi interim dikeluarkan menghalang defendan dan/atau agen-agennya dan/atau wakil-wakilnya dan/atau pekerja-pekerjanya dan/atau pegawai-pegawainya dan/atau mana-mana Bank dan mana-mana Institusi Kewangan di Malaysia dan/atau ahli keluarga defendan dan/atau mana-mana pihak yang ada urusan dengan defendan yang keatasnya diserahkan perintah ini sebaliknya sesiapapun, tanpa terlebih dahulu mendapatkan kebenaran daripada plaintif daripada melupuskan atau memindahkan, menganugerahkan, menjual, berurusan atau memecahkan pemilikan terhadap mana-mana harta atau aset boleh ubah

dan juga tidak boleh ubah defendan sehingga pendengaran tindakan ini secara inter parte pada 1 Jun 1998 untuk penyambungan perintah yang dipohon disini, tarikh tersebut adalah 2 minggu daripada tarikh perintah ini;

(C) Bahawa defendan dan/atau agen-agennya dan/atau wakil-wakilnya dan/atau pekerja-pekerjanya dan/atau pegawai-pegawainya dan/atau mana-mana Bank dan mana-mana Institusi Kewangan di Malaysia dan/atau ahli keluarga defendan dan/atau mana-mana pihak yang ada urusan dengan defendan yang keatasnya diserahkan perintah ini yang mempunyai kuasa dan/atau kawalan keatas harta-harta defendan yang sah di sisi undang-undang memberitahu dan/atau menyatakan kepada peguamcara plaintif kesemua harta-hartanya samada boleh ubah atau tidak boleh ubah.

(D) Selanjutnya diperintahkan juga menurut s 15 Debtors Act 1957 bahawa pihak polis dan Pihak Jabatan Imigresen diperintahkan untuk menangkap defendan dan kemudiannya dibawa kehadapan Mahkamah Yang Mulia ini untuk tunjuk sebab mengapa defendan tidak perlu mengemukakan jaminan sebanyak RM11,097,000 sepertimana yang dituntut oleh plaintif di dalam saman dan pernyataan Tuntutan Guaman Sivil 22-231-1998 bagi menjamin kehadiran defendan.

Diturunkan di bawah tandatangan saya dan meterai Mahkamah Tinggi di Johor Bahru pada 23 May 1998

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PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI
JOHOR BAHRU

Since the defendant was not in the country, the plaintiff obtained an order dated 1 June 1998 as reflected in encl 12 in the nature of a mandatory injunction until the final disposal of the present civil suit against the defendant and in the event the defendant was traced and located the order of this court in encl 7 together with the summons in chambers in encl 5 would be served and subsequently a new date for hearing interpartes would be given. The order in encl 12 in its original text was worded as follows:

DALAM MAHKAMAH TINGGI DI JOHOR BAHRU
DALAM NEGERI JOHOR, MALAYSIA
GUAMAN SIVIL NO 22-231 TAHUN 1998

Antara

BANK BUMIPUTRA MALAYSIA BHD
CAWANGAN JOHOR BAHRU
(No Syarikat 6175-W)

... Plaintif

Dan

CHEONG YOKE CHOY
(No KP Baru 550324-10-5981)
(No KP Lama 4760742)

... Defendan

DIHADAPAN YANG ARIF
DATO' HJ ABDUL MALIK BIN HJ ISHAK
HAKIM, MAHKAMAH TINGGI MALAYA
JOHOR BAHRU
DALAM KAMAR
PADA 1 JUN 1998

PERINTAH

Mengikut perintah mahkamah dalam kausa ini yang dikeluarkan pada 23 haribulan Mei 1998 (Kand 7) dalam tindakan ini telah dipanggil untuk perbicaraan secara inter parte pada hari ini di atas kehadiran En Ibrahim bin Hashim, peguam bagi plaintif yang dinamakan diatas DAN SETELAH MEMBACA afidavit tambahan Mohd Eunos bin Hj Ali yang diikrarkan pada 29 haribulan Mei, 1998 dan juga afidavit tanpa penyampaian yang diikrarkan oleh M Ananthan a/l Muniyandi pada 29 haribulan Mei 1998 ADALAH PADA HARI INI DIPERINTAHKAN memandangkan saman dalam kamar (Kand 5) dan perintah mahkamah bertarikh 23 haribulan Mei, 1998 (Kand 7) tidak dapat diserahkan keatas defendan maka perintah injunksi yang diberikan pada 23 Mei 1998 oleh mahkamah yang mulia ini adalah sekarang dilanjutkan/dikekalkan dan dijadikan sebagai satu perintah injunksi Mandatori sehingga penyelesaian akhir dan muktamad Guaman Sivil No 22–231–1998 (Kand 3) yang diambil oleh plaintif terhadap defendan DAN ADALAH AKHIRNYA DIPERINTAHKAN bahawa sekiranya defendan telah dapat ditemui oleh plaintif maka saman dalam kamar (Kand 5) dan perintah mahkamah bertarikh 23 Mei 1998 (Kand 7) hendaklah serta-merta diserahkan keatas defendan dan mahkamah yang mulia ini akan menetapkan satu tarikh baru bagi pendengaran kausa ini secara interparte.

Diturunkan di bawah tandatangan saya dan meterai Mahkamah Tinggi di Johor Bahru pada 1 Jun 1998.

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PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI
JOHOR BAHRU

Perintah ini adalah dikeluarkan oleh Tetuan Hassan Ibrahim & Co, Peguambela & Peguamcara bagi Plaintif yan dinamakan diatas dimana alamat penyampaian mereka adalah di Bilik 508-510, Tingkat 5, Merlin Tower, Jalan Meldrum, 80000 Johor Bahru. {Ruj Fail: HI.AD BBMB JB 3302/98}

INDORSAN SEBAGAIMANA ATURAN 45 KAEDAH 7 (4)
KAEDAH-KAEDAH MAHKAMAH TINGGI, 1980

Sekiranya Defendan CHEONG YOKE CHOY mengabai perintah ini, kamu CHEONG YOKE CHOY (No Kad Pengenalan 550324-10-5981 (Baru) dan (4760742) (Lama) akan dikenakan proses pelaksanaan bagi memaksa kamu mematuhi perintah ini.

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PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI MALAYA
JOHOR BAHRU

At this juncture, it brings to mind the case of *Lim Nyook Yin v Ultratech Sdn Bhd & Anor* [1995] 1 AMR 183 where I said at p 187 of the report:

Now, with the insertion of r 2B to O 29 of the RHC, the Rules Committee must have intended that all ex-parte interim injunctions be valid for two weeks and return dates be given forthwith preferably before the expiry of the two weeks to enable the matter to be argued fully. It must also be pointed out that in the inter partes hearing, the ex-parte interim injunction may be further extended inter partes until the disposal of the main suit. That the court has such an inherent power to make such an order is beyond dispute (see O 92 r 4 of the RHC).

Now, the order dated 18 May 1999 as seen in encl 30 was more in the nature of a charging order and it was worded, in its original text, as follows:

DALAM MAHKAMAH TINGGI MALAYA DI JOHOR BAHRU
DALAM NEGERI JOHOR, MALAYSIA
GUAMAN SIVIL NO 22–231 TAHUN 1998

Dalam Perkara Aturan 50 Kaedah 2 (3),
Kaedah-Kaedah Mahkamah Tinggi,
1980

Antara

BANK BUMIPUTRA MALAYSIA BHD
CAWANGAN JOHOR BAHRU
(No Syarikat 6175 – W) ... Plaintif

Dan

CHEONG YOKE CHOY
(No KP Baru 550324-10-5981)
(No KP Lama 4760742) ... Defendan

DI HADAPAN YANG ARIF
DATO' HJ ABDUL MALIK BIN HJ ISHAK
HAKIM, MAHKAMAH TINGGI MALAYA
JOHOR BAHRU

DALAM KAMAR
PADA 18 MEI 1999

PERINTAH

DI ATAS PERMOHONAN Plaintif yang dinamakan di atas yang dibuat melalui Saman Dalam Kamar (Kand 23) bertarikh 10 Mei 1999 DAN SETELAH MEMBACA Afidavit Sokongan (Kand 23A) yang diikrarkan oleh Mohd Eunos bin Haji Ali pada 7 Mei 1999 DAN SETELAH MENDENGAR En Ibrahim bin Hashim, Peguam bagi Plaintif yang dinamakan di atas ADALAH PADA HARI INI DIPERINTAHKAN bahawa Malaysian Central Depository Sdn Bhd (No Syarikat 165570-W) diarahkan untuk membekalkan kepada Plaintif maklumat-maklumat penuh tentang syer yang dipegang oleh Defendan dalam Syarikat tersebut DAN SELANJUTNYA DIPERINTAHKAN bahawa Malaysian Central Depository Sdn Bhd tersebut dilarang menjalankan apa-apa transaksi bagi pihak kepentingan Defendan yang memegang syer di dalam syarikat tersebut DAN AKHIR DIPERINTAHKAN bahawa kos permohonan ini dibayar oleh Defendan kepada Plaintif.

Diturunkan di bawah tandatangan saya dan meterai Mahkamah Tinggi di Johor Bahru pada 18 Mei 1999.

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PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI
JOHOR BAHRU

PERINTAH ini adalah difailkan oleh Tetuan Hassan Ibrahim & Co, Peguambela & Peguamcara bagi Plaintif yang dinamakan di atas di mana alamat penyampaian mereka adalah di Bilik 508-510, Tingkat 5, Merlin Tower, Jalan Meldrum, 80000 Johor Bahru.

INDORSAN SEBAGAIMANA ATURAN 45 KAEDAH 7(4) KAEDAH-KAEDAH MAHKAMAH TINGGI 1980

Sekiranya kamu MALAYSIAN CENTRAL DEPOSITORY SDN BHD (No Syarikat 165570-W) mengabai perintah ini, kamu MALAYSIAN CENTRAL DEPOSITORY SDN BHD (No Syarikat 165570-W) akan dikenakan proses pelaksanaan bagi memaksa kamu mematuhi perintah ini.

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PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI MALAYA
JOHOR BAHRU

Mareva injunction

As a Mareva applicant, the plaintiff need only show that there is a real risk, or in local parlance, at least a risk, that the defendant will dissipate the assets with the sole object of putting the assets out of the reach of the plaintiff and, consequently, nullifying any judgment that the plaintiff may recover. As it turns out, the plaintiff in the present case has obtained a judgment against the defendant in the sum of RM11,097,000 and there is certainly a risk, nay a real certainty, that the defendant will dissipate the monies at a speed beyond control. In encl 34, Eunos expressed the fear that the plaintiff will be frustrated in its attempt to recover the fruits of the judgment which he has obtained. The plaintiff's fear was certainly well founded and grounded. Lord Denning, the brilliant judge, once said in *Mareva Cia Nav v International Bulkcarriers* (1975) 2 Lloyd's Rep 509 at p 510, (1979) 119 Sol J 660:

> There is jurisdiction to grant an injunction if there is a danger that the debtor may dispose of his assets so as to defeat (the debt) before judgment.

Being a prolific judge, Lord Denning in another case by the name of *Ets Esefka v Central Bank of Nigeria* (1979) 1 Lloyd's Rep 445 at p 448 aptly said:

> (The jurisdiction exists) where there is danger of the money being taken out of the jurisdiction so that if the plaintiffs succeed they are not likely to get their money.

and continuing in the same vein was the speech of Lord Justice Brandon, in the same case, at p 449 where his Lordship said tersely:

> (The jurisdiction exists where) the assets of the defendants are likely to be removed from the jurisdiction so as to avoid payment of any judgment which the plaintiffs might obtain.

Once again in the case of *Abdul Rahman v Abu Taha* [1980] 3 All ER 409, especially at p 412, Lord Denning in fine language had this to say:

> (An injunction may be granted against a resident of the United Kingdom) if the circumstances are such that there is a danger of his absconding, or a danger of his assets being removed out of the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.

Continuing in the case of *Z Ltd v A* [1982] 1 All ER 556 at p 571, Lord Denning said:

> The Mareva injunction extends to cases where there is a danger that the assets will be dissipated in this country as well as by removal out of the jurisdiction.

The defendant in the present case had left the country with his illgotten gains. In the case of *Al Nahkel for Contracting and Trading Ltd v Lowe* [1986] 1 All ER 729 the court had to reckon with the defendant intending to leave jurisdiction with money alleged to have been stolen and the facts may be stated as follows. The defendant, who was alleged to have stolen some money to the tune of £14,000 from the plaintiff in Saudi Arabia, flew to London with the intention of flying on to Manila the next day. This prompted the plaintiff to apply for a Mareva injunction restraining the defendant from removing from the jurisdiction or dissipating assets up to £14,000 and sought leave to issue a writ ne exeat regno restraining the defendant from leaving the jurisdiction unless he gave security for £14,000. The court held that it had jurisdiction to issue a writ ne exeat regno in support of a Mareva injunction in order to prevent a defendant from leaving the jurisdiction with assets in order to frustrate a lawful claim before the court. In the circumstances of the case, the court held that since it was likely that the defendant would leave the jurisdiction with the money alleged to have been stolen, leave to issue a writ ne exeat regno was granted.

It is interesting to note that for the writ ne exeat regno to be issued, there must be a claim for a debt or pecuniary demand and that debt must be certain and not contingent, and further the debt must be presently due: *Colverson v Bloomfield* (1885) 29 Ch D 341. It follows therefore that the writ ne exeat regno would not be available where the claim is and in the form of damages (*Cock v Ravie* (1801) 6 Ves 283; and *Blaydes v Calvert* (1820) 2 Jac & W 211). Then there is a proposition of law which says that the writ ne exeat regno would only be available when there is evidence that the defendant is about to leave the country and be outside the jurisdiction, such evidence pointing to that direction must be direct and totally unequivocal (*Etches v Lance* (1802) J Ves 417; *Hyde v Whitfield* (1815) 19 Ves 342; *Jones v Alephsin* (1810) 16 Ves 470; and *Re Underwood, Re Bowles, U v W* (1903) 51 WR 335 (CA)). The case of *Tomlinson v Harrison* (1802) 8 Ves 32 lays down the principle that it is not necessary to show that the defendant is going abroad to avoid the demand, all the plaintiff needs to show is that the debt is in danger.

Now, since the defendant has fled the country the sage words of *Lord Justice Bridge in Montecchi v Shimco* [1979] 1 WLR 1180, at pp 1183-

1184 must be emphasised and put in the forefront. This was what his Lordship said:

> ... the basis of the Mareva injunction is that there has to be a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he seeks to sue ...

That this court has the jurisdiction to issue Mareva injunction can never be doubted (see para 6 of the Schedule to the Courts of Judicature Act 1964 which must be read with O 29 of the Rules of the High Court 1980 ('the RHC') and s 50 of the Specific Relief Act 1950) and the facts of the present case must surely attract the issuance of a Mareva injunction. Basically a Mareva injunction is a prohibitive injunction restraining the defendant from disposing of or dissipating the assets. It is an interlocutory order designed to prevent a defendant from negating the effect of a judgment which may be entered against him by the court. Mareva injunctions are usually granted before judgment and it can also be granted to a judgment creditor in the course of execution (*Stewart Chartering v C & O Managements SA, The Venus Destiny* [1980] 1 All ER 718; *Orwell Steel Ltd v Asphalt and Tarmac* (UK) Ltd [1985] 3 All ER 747). A word of caution must be advanced. A Mareva injunction does not create a lien or any proprietary right nor does it give the plaintiff security or priority over the assets frozen by the injunction (*Cretanor Maritime Co Ltd v Irish Marine Management* [1978] 3 All ER 164).

It was most unfortunate that the defendant had left the country. Had the defendant been within our shores in our country, I have no qualms to grant the Mareva injunction together with an order restraining the defendant from leaving the country (*Bayer AG v Winter and Others* [1986] 1 All ER 733; and Al Nahkel for *Contracting and Trading Ltd v Lowe*) as it would, in the circumstances, be just and convenient to do so.

Anton Piller order

The late Yusof Rashid J (as he then was) blazed a trail when he applied the case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 All ER 779 in adjudicating the case of *Lian Keow Sdn Bhd v C Paramjothy & Anor* [1982] 1 MLJ 217. In that case his Lordship, the late Yusof Rashid J (as he then was), in a claim for land held on trust for the plaintiff granted the Anton Piller order as there was a serious danger of the first defendant destroying the trust deed and the relevant file relating to the land. The then *Federal Court in Asia Television Ltd v Viwa Video Sdn Bhd* [1984] 2 MLJ 304 reversed the decision of the High Court when the learned judge set aside the Anton Piller orders by granting and restoring the Anton Piller orders. In *Emanuel v Emanuel* [1982] 1 WLR 669, 679, Wood J granted the Anton Piller order and extended it to documents which were not related to the issue of maintenance. In *Third Chandris Shipping Corp & Anor v Unimarine SA* [1979] 2 All ER 972 particularly at p 985, Lord Denning had this to say:

> In setting out those guidelines, I hope we shall do nothing to reduce the efficacy of the present practice. In it speed is of the essence.
>
> Ex parte is of the essence. If there is delay, or if advance warning is given, the assets may well be removed before the injunction can bite. It is rather like the new injunction in chancery, the Anton Piller injunction, which has proved equally beneficial. That must be done speedily ex parte before the incriminating material is removed. So here is Mareva injunctions before the assets are removed. The solicitors of the City of London can, I believe, continue their present practice so long as they do it with due regard to their responsibilities; and so long as the judges exercise a wise discretion so as to see that the procedure is not abused.

In *Bayer AG v Winter & Ors* the Court of Appeal granted the Mareva injunction and an Anton Piller order in favour of the plaintiffs. The Court of Appeal too restrained the defendant from leaving jurisdiction. The facts of that case may be narrated as follows. There, the plaintiffs, a pharmaceutical company, began an action against the defendants, claiming damages in respect of the alleged wrongful worldwide distribution and sale of counterfeit insecticide purporting to be a product of the plaintiffs. Pending the hearing of the action the plaintiffs applied to the High Court for a Mareva injunction and an Anton Piller order requiring, inter alia: (i) that the defendants disclose the whereabouts of documents relating to transactions worldwide in which the counterfeit insecticide had been supplied or offered for sale; (ii) that they swear an affidavit setting forth particulars of such transactions; and (iii) that they deliver up the relevant documents to the plaintiffs' solicitors. It transpired that the plaintiffs feared that the first defendant would evade the effect of such orders by leaving the jurisdiction and therefore sought further injunctive relief, namely: (i) that the first defendant deliver up his passports; and (ii) that he be restrained from leaving the jurisdiction until the Anton Piller order had been executed. The learned judge of the first instance granted the Mareva and the Anton Piller orders but simply refused to grant the further relief. The plaintiffs appealed to the Court of Appeal, and they contended that the court had jurisdiction to grant the further relief under s 37(1) of the Supreme Court Act 1981, which provided that the court had jurisdiction to grant an injunction ... in all cases in which it appears ... to be just and convenient to do so, and that the further relief ought to be granted because the evidence showed that there was a real risk that the first defendant would leave the jurisdiction thereby depriving the plaintiffs of the benefit of the Anton Piller order. It was conceded that the writ ne exeat regno was not appropriate in the circumstances. The Court of Appeal deliberated and held that it was clear on the true construction of s 37(1) of the Supreme Court Act 1981 and from established practice that the court had a wide discretion to do what was just and reasonable in the circumstances to ensure the proper administration of justice at the hearing of the action. The Court of Appeal also held that the relief sought was necessary and reasonable as being ancillary to the due performance of the court's function of protecting, by means of the Anton Piller and Mareva orders, the plaintiffs' rights pending the hearing of the action. There was accordingly jurisdiction to grant the further relief sought. In the circumstances, balancing the hardship to the

plaintiffs if they were deprived of the benefit of the Anton Piller order against the hardship caused to the first defendant by interfering with his liberty, and taking into account that unless the further relief sought was granted there was a real risk that the plaintiffs' action would suffer, whereas the first defendant would be protected by applying to have the order granting the further relief discharged and by the plaintiffs giving an undertaking in damages, it was appropriate to grant the further relief sought for the protection of the plaintiffs. But the Court of Appeal was very prudent when it said that since the further relief would constitute an interference with the liberty of the subject, it ought not to be granted for any longer than was necessary to enable the plaintiffs to execute the Mareva and Anton Piller orders. The Court of Appeal then allowed the appeal. Fox LJ in a separate judgment at p 737 to p 738 of the report had this to say:

> Counsel for the plaintiffs referred us to the decision in *Astro Exito Navegacion SA v Southland Enterprise Co Ltd* (Chase Manhattan Bank NA intervening), The Messiniaki Tolmi [1982] 3 All ER 335, [1982] QB 1248. In that case the court cited with approval the observations of *Jessel MR in Smith v Peters* (1875) LR 20 Eq 511 at pp 512-513 in which he said this:
>
> > 'The first question that I have to consider is, whether this application is in accordance with the practice of the Court. I have no hesitation in saying that there is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. I know of no other limit. Whether they are or are not to be granted must of course depend upon the special circumstances of the case. But if authority were wanting for my guidance in this matter — and I think the principle is so clear that authority is not wanting — I might refer to the case which has been mentioned by the Plaintiff's counsel, of *Kynaston v East India* Co (1819) 3 Swans 248, 36 ER 850), which was an application in a tithe suit to inspect the defendant's house before the hearing, in order to ascertain its value.'
>
> It is clear from the language of the section itself and from Jessel MR's statement of the general width of the practice of the court, and from the approach of the Court of Appeal itself in the Astro case that the court has a wide discretion to do what appears to be just and reasonable in the circumstances of the case.
>
> The court has to exercise that discretion according to established principles, and the particular matter with which we are concerned at the moment, namely of an injunctive restraint on a person leaving the jurisdiction, is not one on which there appears to be previous authority. It is clear, however, that the law in relation to the grant of injunctive relief for the protection of a litigant's rights pending the hearing of an action has been transformed over the past ten years by the Anton Piller and Mareva relief which has greatly extended the law on this topic as previously understood so as to meet the needs of justice.
>
> Bearing in mind we are exercising a jurisdiction which is statutory, and which is expressed in terms of considerable width, it seems to me that the court should not shrink, if it is of opinion that an injunction is necessary for the proper protection of a party to the action, from granting relief, notwithstanding it may, in its terms, be of a novel character.

A The position here appears to be this: first, so far as the first defendant is concerned, one asks what harm will this order do him? If he says it will cause him some embarassment or hardship, he can apply to the High Court forthwith, on evidence, to ask that it be varied or, if necessary, discharged. He has therefore an opportunity, if it imposes hardship on him, of establishing that very quickly before a court.

B I turn next to the position from the point of view of the plaintiffs. If the first defendant, on the service of Walton J's order requiring disclosure of the information to which I have referred, declines to give that information, or is not frank in the answers which he gives, then if he leaves the United Kingdom, the plaintiffs are at risk that they will be unable to obtain that information. It appears to be doubtful, at any rate, whether the first defendant has in fact a C permanent residence in this country.

In the circumstances which I have mentioned of the first defendant failing to provide answers to the matters referred to in the order of Walton J, or on his failure to be frank in the answers which he gives, it is open to the plaintiffs to seek an order for cross-examination; and the first defendant, if he remains within the jurisdiction, could be compelled to attend for that purpose. If, D however, he has left the jurisdiction, then in those circumstances the order would be frustrated.

Therefore it seems to me that the court is faced with a situation in which there is a risk to the plaintiffs that they may not obtain the information ordered to be disclosed, unless the order which is now sought is granted; while, at the same time, any risk of hardship to the first defendant is dealt with by his E capacity to apply to a judge to vary or discharge the order.

For the reasons which I have indicated, therefore, I would be prepared to grant the order which counsel for the plaintiffs now seeks; that is to say, an injunction restraining the first defendant from leaving the jurisdiction, and secondly, that he deliver up his passports. The orders are, in my view, in Jessel MR's words, 'necessary and reasonable orders which are ancillary to the due F performance of the Court's functions'. *Cumming Bruce LJ in House of Spring Gardens Ltd v Waite* (1985) 11 FSR 173 at 183 emphasised the power and duty of the court (in relation to a case where an order had been made that the defendants identify their assets and disclose their whereabouts) to take 'such steps ... as will enable the order to have effect as completely and successfully as the powers of the court can procure'.

G The time during which the first of those orders should run should, and counsel for the plaintiffs accepts this, be of very limited duration. It is an interference with the liberty of the subject, so that the period should be no longer than is necessary to enable the plaintiffs to serve the Mareva and Anton Piller orders which they have obtained, and endeavour to obtain from the defendant the information which is referred to in those orders.

H Counsel for the plaintiffs therefore propose, and I would accept, that in the first of the proposed orders a period of two days should be inserted, so that it will read: 'The first defendant be restrained until after two days or further order in the meantime ...'

For the reasons which I have indicated, I would allow the appeal and I include in the order the two further paragraphs which I have indicated.

In a concurring judgment, Ralph Gibson LJ had this to say further down the same page of the same judgment:

I agree with Fox LJ that the appeal against the order of the judge should be allowed for the reasons which he has given. I agree also with the order he has proposed should be made. I will add very little.

I found the order which counsel for the plaintiffs asked this court to make at first glance to be surprising. However, with great care, he explained both the novelty and the nature of the order which he sought, and it became apparent that that which was sought was no more than could be enforced against the first defendant if he chose to remain in this country. I therefore became persuaded that the court should make the order which has been asked for. If the first defendant chooses to comply with the order readily and with candour, it will cause him very little trouble.

I also agree that if it should turn out the order has been made in circumstances which will cause unusual difficulty for the first defendant, he can apply for discharge and there is no doubt whatever of the ability of these plaintiffs to satisfy any claim that he may have on the basis of their undertaking in damages.

We were referred to *House of Spring Gardens Ltd v Waite* (1985) 11 FSR 173, which was concerned with a Mareva injunction, where the powers of the court under the statute are referred to. Cumming-Bruce LJ said (at p 183):

> 'The court has the power (and, I would add, the duty) to take such steps as are practicable upon an application of the plaintiff to procure that where an order has been made that the defendants identify their assets and disclose their whereabouts, such steps are taken as will enable the order to have effect as completely and successfully as the powers of the court can procure.'

These proceedings are concerned not so much with the Mareva part of the injunction as the attempt to obtain information.

For the reasons which Fox LJ has given, I accept that the court has both the power and, in this case, the duty to accede to the order which is requested.

Now, by its very nature the Anton Piller order is usually applied for ex parte and it can even be applied before the writ is served. Speed and the element of surprise must be there as that would prevent the defendant from dissipating the assets. *Lord Denning in Rank Film Ltd v Video Information Centre* [1982] AC 380 at p 406 described the Anton Piller order in this way:

> It is an innovation which has proved its worth time and again. So long as the evidence is strong enough, it is now common place for orders to be made against a householder ex parte, not only to restrain him from making or distributing infringing copies, but also so as to require him to permit his premises to be searched, and to require the infringing copies to be produced, also the invoices and documents disclosed, and furthermore for him to give the names and addresses of makers who supply him. In nearly every case the householder complies with the order. He raises no objection. He could object, if he wished to do so, but this is at the risk of proceedings being taken against him for contempt. Rather than take the risk, he complies with the order.

Mandatory injunction

As I said encl 12 was in the nature of a mandatory injunction and the court has the jurisdiction to grant that kind of injunction at the interlocutory stage of the proceedings (*Laguna v Service Hotels Ltd* [1969] 2 Ch 209; and

Thomas M Heysek v Boyden World Corp [1989] 1 MLJ 219). That the courts have been inclined to allow mandatory injunctions can readily be seen in a number of cases. In *Daniel v Ferguson* (1891) 2 Ch 27, for instance, the court granted an interlocutory injunction which in effect was quite mandatory in nature where the defendant was ordered to demolish part of a wall that was erected by him but was expressed as an order restraining the defendant from permitting the wall to remain. It was, so to speak, an order couched in the double negative. Then there was a case in 1880 which went by the name of *Strelley v Pearson* (1880) 15 Ch D 113, where the plaintiff sought and obtained an interlocutory injunction to restrain the defendant from ceasing to pump water out of a mine. But the double negative orders were finally put to an end by the English Court of Appeal in the case of *Jackson v Normanby Bank Co* (1899) 1 Ch 438 when the court held that it would be better to employ plain, simple and direct words in drafting court orders. Enclosure 12 was certainly drafted in a simple language, very direct and to the point. To obtain an interlocutory mandatory injunction the plaintiff has to show that he has an unusually strong and clear case and that there are special prevailing circumstances that would warrant the court in granting him the relief. The test was propounded by Megarry J in the case of *Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402 in these words:

> In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

The English Court of Appeal in *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901 approved the test as propounded by Megarry J in *Shepherd Homes Ltd v Sandham* and there the court said that:

> ... the statement of principle by Megarry J in relation to the very special case of the mandatory injunction is not affected by what the House of Lords said in the American Cyanamid case. The matter before the court is not only an application for a mandatory injunction, but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

Another salutary rule to note and remember is this. That in a mandatory injunction, the defendant must know exactly what he has been restrained from doing or performing (*Kennard v Cory Bros & Co Ltd* [1922] 1 Ch 265 at p 274).

These are the general principles that must be put in the forefront in adjudicating encl 28.

Charging order

Order 50 r 2 of the RHC states as follows:

> (1) The court may for the purpose of enforcing a judgment or order for the payment of an ascertained sum of money to a person by order in Form 104 impose on any interest to which the judgment debtor is beneficially entitled in such of the securities to which this rule applies as

may be specified in the order a charge for securing payment of the amount due under the judgment or order and interest thereon.

(2) Any such order shall in the first instance be an order to show cause, in form 105 specifying the time and place for further consideration of the matter and imposing the charge until that time in any event.

(3) The securities to which this rule applies are —

(a) any government stock, and any stock of any company registered under any written law, including any such stock standing in the name of the Accountant-General; and

(b) any dividend of or interest payable on such stock.

(4) In this order 'government stock' means any stock issued by the Government or any funds of or annuity granted by the Government, and 'stock' includes shares, debentures and debenture stock.

and it is clear that a charging order can only be obtained in respect of an ascertained sum and no more (*Widgery v Tepper* (1877) 6 Ch D 364). This means that the court has no power at all to grant a charging order for an unascertained sum (*A & M Records Inc & Ors v Darakjian & Anor* [1975] 3 All ER 983). A charging order may, in exceptional circumstances, be made in respect of a fixed sum of money which is payable not immediately but rather put in abeyance at a future date (*Bagnall v Carlton* (1877) 6 Ch D 130; and *Robinson v Bailey* (1941–1942) Ch 268).

A charging order can certainly be imposed on those securities as specified in O 50 r 2(3) of the RHC and in relation to money in court as exemplified in O 50 r 8(1) of the RHC. What the judgment creditor can get under the charging order would be circumscribed by the order given by the court. In short, a judgment creditor cannot by means of a charging order get more than what he has bargained for. The shares of the judgment debtor in *Gill v Continental Union Gas Co* (1872) LR 7 Ex 332 were sold to the defendant company before the plaintiff could even obtain judgment and the transfer was registered after the charging order nisi was made absolute. On these facts, the court held that the plaintiff had failed in his action against the company for permitting the share transfer as the judgment debtor in whose name the shares stood had no beneficial interest in them.

In *South Western Loan & Discount Co v Robertson* 8 QBD 17, and *Bolland v Young* (1904) 2 KB 824, the courts there held that when shares were registered in the name of a person, but that person, in fact, had no beneficial interest therein but rather held them in trust for the defendant against whom a judgment had been recovered, then the judgment creditor was said to be entitled to obtain a charging order on those shares. Order 50 r 3 of the RHC states that an application for a charging order must be made ex parte by summons supported by an affidavit:

(a) identifying the judgment or order to be enforced, stating the amount unpaid under it at the date of the application, and showing that the applicant is entitled to enforce the judgment or order;

(b) specifying the securities on the judgment debtor's interest in which it is sought to impose a charge and in whose name they stand;

(c) stating that to the best of the information or belief of the deponent, the judgment debtor is beneficially entitled to an interest in the securities in question, describing that interest, and stating the sources of the deponent's information or the grounds for his belief.

Sometimes it is necessary that the charging order nisi and the charging order absolute contain an injunction to prevent the securities from being dealt with before the hearing of the application for an order absolute. Rule 9 of O 50 of the RHC empowers the registrar to grant an injunction and at the same time appoint a receiver thereto (*Hwang Ju-in v Huang Han Choo* [1977] 2 MLJ 229 (CA)) but only if, and so far as, it is necessary or incidental to the making of a charging order under r 2 (which relates to securities) or under r 8 (in relation to money in court). Rule 6 of Order 50 of the RHC allows for the making of the charging order nisi to be made absolute in the absence of sufficient cause to the contrary or for its discharge and it further provides that an order absolute shall only be effective as a valid charge made by the judgment debtor. *Lord Brandon in Roberts Petroleum Ltd v Bernard Kenny Ltd* (in liquidation) [1982] 1 All ER 685 (CA), stated the principles wherein a charging order may be made absolute in this way:

(a) that it is entirely in the discretion of the court;

(b) that the judgment debtor carries the burden of showing cause as to why a charging order nisi should not be made absolute;

(c) that the court must always bear in mind that there is no material difference between making absolute the charging order nisi and making absolute the garnishee order nisi;

(d) the court in exercising its discretionary power has the right and the duty to take into account all the circumstances of the case irrespective of whether those circumstances surfaced before or after the making of the order nisi; and

(e) the court in exercising its discretion must be fair to all parties whether it be the judgment debtor or all other unsecured creditors.

Reverting back to the phrase 'sufficient cause to the contrary' that appears in r 6(1) of O 50 of the RHC, I must say that the charging order will not be made absolute when it appears that the judgment debtor has died when the order nisi was obtained as exemplified in the case of *Finney v Hinde* (1879) 4 QBD 102. The court will always be cautious and will refuse to make the order absolute when it would give the plaintiff priority over unsecured creditors of a defendant who is, in all likelihood, insolvent (*Rainbow v Moorgate Properties Ltd* [1975] 2 All ER 821 (CA)).

Robinson v Bailey [1942] All ER Annotated 498 is an interesting case. It is a decision of Simonds J where his Lordship had occasion to deal with an order that was made in respect of a debt not immediately payable. His Lordship too was of the view that the value of the property charged must bear a reasonable proportion to the amount of the debt. The facts of that case may be stated as follows. There, the judgment dated 25 February 1941 ordered, inter alia, that the defendant should pay to the plaintiff such annual

sum after taking into account the deduction of income tax at the standard rate for the time being in force leaving a sum of £50, and that such annual sum to be paid by quarterly instalments. This annuity was to be paid until the execution by the defendant of certain documents mentioned in the schedule to the order, and both parties agreed that it was payable only during the plaintiff's lifetime. There was delay in performing a number of obligations imposed by the order and so by December 1941, a sum of £275 was owing by the defendant to the plaintiff by way of damages and costs. On 13 December 1941, the plaintiff obtained a charging order nisi, for the payment of this sum on £3,333 of Local Loan Stocks belonging to the defendant. The debt in respect of which the charging order was made was paid off shortly afterwards. On 13 January 1942, the plaintiff obtained a second charging order nisi charging the stock with the payment of the annuity. On that date, however, no instalment of the annuity was due. The defendant applied to have the order nisi discharged. The court held that it had jurisdiction to make the charging order notwithstanding that the debt was not immediately payable. The court too held that the jurisdiction to make a charging order in respect of a future debt was to be exercised very guardedly, and it would not be a proper exercise of the court's discretion to make a charging order on £3,333 of stocks in respect of the annuity of £50. Accordingly, the court ordered the order nisi to be discharged forthwith.

At this juncture, I would like to revert back to the case of *A & M Records Inc & Ors v Darakdjian & Anor* and the facts of which may be stated as follows. There the plaintiffs were awarded two sets of costs against the defendants, such costs to be taxed if not agreed. Costs were not agreed and in due course a bill of costs was submitted for taxation. Meanwhile the plaintiffs applied to the court for a charging order under s 35(1) of the Administration of Justice Act 1956 on certain freehold property belonging to the defendants, as they were apprehensive that the property might be sold leaving them without any prospect of recovering their costs. At the time of the application, the bill of costs had not been finally taxed. It was held that the application would be dismissed because the court had no power under s 35(1) of the Administration of Justice Act 1956 to impose a charge on the land of a judgment debtor for an unascertained sum. So far as it was material, s 35(1) of the Administration of Justice Act 1956 was worded as follows:

> The High Court ... may, for the purpose of enforcing a judgment or order ... for the payment of money to a person, by order impose on any such land or interest in land of the debtor as may be specified in the order a charge for securing the payment of any moneys due or to become due under the judgment or order.

and Walton J had to construe this very provision in the context of the facts of the case. His Lordship at p 985 of the report had this to say:

> But can one impose a charge before there is an ascertained sum, or before, in the case of costs, the costs have been taxed? My answer to that is clearly in the negative, and I arrive at it primarily from the point of view that this is quite clearly a section for the enforcement of judgments or orders; it is

not a section designed to impose in any way a penalty or disability on the judgment debtor because he has to pay a sum. If it were not restricted to ascertained sums but could be imposed for any sums which are unascertained at the date of the imposition of the charging order, for example, sums due under an enquiry as to damages, or even merely, without going outside the boundaries of the present case, in respect of unascertained costs, it seems to me that the most alarming results would follow. It would mean, in substance, that the charge having been imposed, the asset, whatever it was, on which the charge was imposed, was in the hands of the judgment debtor completely sterilised because he could not dispose of it or raise money on it in any way, since it would be utterly impossible for the intending purchaser or lender of money-mortgagee-to know what the amount of the equity remaining in the debtor might or might not finally turn out to be. It would be an absolutely crushing burden on the judgment debtor.

Faced with that difficulty, which counsel for the plaintiffs fully and frankly realised, he said one could have, as it were, a mini-enquiry to discover what the limits of the damages under the enquiry for damages or the limits under the costs might be. He went on to say that the difficulty hardly arose in the present case, because it was only round the corner and we should have the certificate of the taxing master. But the objection I raise goes not to the question of whether the discretion, which I undoubtedly have under that section, should be exercised, but whether I have any power at all where the sum is unascertained. It seems to me that, however one dresses it up, one would be imposing a penalty on the debtor, because one would be putting on his land for however short a time, and in some cases it would be a very long time indeed, a charge which would prevent him from freely dealing with the interest in the land which he undoubtedly, at the end of the day, would be found to have.

Moreover, it seems to me that although s 35(1) uses the words 'for securing the payment of any moneys due or to become due under the judgment or order' that means all moneys due or to become due under the judgment or order. One cannot say: 'I must at least get £500 on an enquiry as to damages. Therefore I want a charging order for £500.' It seems to me that the charging order was intended to be a simple method of procedure designed to deal with a simple situation-that is to say, an order saying 'A shall pay B x £'.

I am reinforced in that view, for what it is worth, by the terms of RSC O 50 r 1(4), which, dealing with the machinery under s 35 of the 1956 Act, says:

> 'The application [for the order] must be supported by an affidavit — (a) identifying the judgment or order to be enforced, and stating the name of the judgment debtor on whose land or interest it is sought to impose a charge and the amount remaining unpaid under the judgment or order at the time of the application ...'

It seems to me that that proceeds, and correctly proceeds, on the basis that one must know what the amount is for which the charge is to go.

So much for the law and now to the heart of the matter.

Intervention by the intervener and contempt of court

Order 15 r 6(2)(b) of the RHC states as follows:

(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application — A

(b) order any of the following persons to be added as a party, namely — (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely B determined and adjudicated upon, or (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; C

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

and it gives the discretion to the court to decide whether to allow the application to intervene or otherwise (*Roberts v Holland* (1893) 1 QB 665). An applicant must have an interest directly related to the subject matter of D the action before the applicant can be said to be entitled to intervene in the action (*Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984] 1 WLR 452). A mere commercial interest in the outcome of the civil action is insufficient to entitle a person to intervene (*Lee Meow Lim v Lee Meow Nyin t/a Cheong Fatt Merchant (Nabisco Brands (M) Sdn Bhd, Intervener)* [1990] 3 MLJ 123). The correct test to apply would be: 'Will his rights against or liabilities E to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?' (per *Lord Diplock in Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 (PC), especially at p 56 left hand column at B; and this very passage was applied by Abdul Malek Ahmad JCA (now FCJ) in *Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690 F (CA), at p 698 of the report.

Mr Lambert Rasa-Ratnam for the proposed intervener argued that the proposed intervener had satisfied the test laid down by Lord Diplock in *Pegang Mining*. He submitted that the rights and liabilities of the intervener were directly affected by the orders. It was his stand that the direct effect of G the orders were so plain and so obvious that the proposed intervener must be allowed to intervene. It was argued that the orders, inter alia, was to the effect that the proposed intervener was to provide the plaintiff with the information on shares held by the defendant.

The proposed intervener's application to intervene in encl 28 must be H viewed in its correct perspective and appraised in the context of the orders. The first order can be seen in encl 7 dated 26 May 1998 and that order had been perfected. The second order, as seen in encl 12, was dated 1 June 1998 and it too had been perfected. The third order, very crucial to encl 28, can be seen in encl 30 and it was dated 18 May 1999. Enclosure 30 had been perfected. The application by the proposed intervener in encl 28 was dated I 22 July 1999 and it was filed on the same date. Calculated from 18 May 1999, the delay in filing encl 28 came up to 2 months 4 days. But, it must

be borne in mind that the first Order in encl 7 dated 26 May 1998 had been served on the proposed intervener on 14 September 1998 and at para 'C' of the first order which had been reproduced somewhere in this judgment stated in general terms that the proposed intervener too was supposed to give the plaintiff the full particulars of the assets of the defendant held by the proposed intervener (see the letter marked as exh 'P8' of encl 34). Incidentally, the second order in encl 12 was also served on the proposed intervener on 14 September 1998. Calculated from 26 May 1998 to the time when the proposed intervener filed the application in encl 28 on 22 July 1999, the delay to file encl 28 came up to one year one month 26 days. If it was argued that the first order in encl 7 was not very specific, then the third order in encl 30 was very specific as it mentioned the proposed intervener by name, yet the proposed intervener had the audacity to thumb at the third order of this court and refused to obey it specifically for two months four days and even today there was still no obedience to the third order of this court. Obedience to a court order cannot be compromised. The third order in encl 30 remained an order emanating from this court — a court of law legally constituted and yet the proposed intervener saw it fit to disobey it. In *Wee Choo Keong v MBF Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217, Tun Abdul Hamid Omar LP in strong and clear language said:

> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

The affidavit of Benothini in encl 27 which was in support of encl 28 did not say that the proposed intervener had obeyed the third order of this court in encl 30. It was totally silent and so the strong and only inference would be that the proposed intervener failed to obey the third order of this court in encl 30. There was certainly contempt and 'all its attendant consequences' must be borne by the proposed intervener. This was my judgment and I so hold accordingly. That would certainly dispose of encl 28 forthwith.

Article 126 of the Federal Constitution states as follows:

> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

Without a doubt, the Supreme Law of our country gives the power to this court 'to punish any contempt of itself.' Lord Denning MR in *Morris v Crown Office* [1970] 2 QB 114 at p 122, [1970] 1 All ER 1079 at p 1081 succinctly said:

> The course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power — a power instantly to imprison a person without a trial — but it is a necessary power.

Wood VC in Spokes v Banbury Board of Health (1865) LR 1 Eq 42 at p 48, said:

> ... the simple and only view is that an order must be obeyed, that those who wish to get rid of that order must do so by the proper course, an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter ...

Sir John Donaldson in *Howitt Transport v Transport and General Workers' Union* (1973) 1 CR1 at 10 had this to say:

> ... orders of any court must be complied with strictly in accordance with their terms. It is not sufficient by way of answer to an allegation that a court order has not been complied with for the person concerned to say that he 'did his best'. But if a court order requires a certain state of affairs to be achieved the only way in which the order can be complied with is by achieving that state of affairs.

I am appalled at the failure of the proposed intervener to obey the order of this court in encl 30. A message must be sent to all and sundry that this court will not take lightly of a contempt of this nature.

Before filing encl 28, the proposed intervener must obey the order of this court as seen in encl 30. This was never done and it was certainly an act of contempt.

Lest I be accused of an oversight, I will now proceed to examine other issues that were raised by the parties.

Requirements of O 15 r 6(2)(b) of the RHC

To late in filing encl 28

En Ibrahim bin Hashim, learned counsel for the plaintiff, stressed and laid emphasis on the words appearing in r 6 (2)(b) O 15 of the RHC, namely: 'At any stage of the proceedings in any cause or matter ...' and he submitted that the application to intervene must be made at an early stage and definitely not after final judgment had been entered and perfected. In support of his argument, En Ibrahim bin Hashim cited a passage appearing in Malaysian Court Practice at p 345 where it was stated that:

> An application for an order in relation to misjoinder or non-joinder may be made at any stage of the proceedings but before final judgment: *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254. A default judgment, which had been perfected, was, having regard to its terms, a final judgment: *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252.

For fear of repetition, the orders were perfected and served on the proposed intervener. As I said, the first and the second orders (encl 7 and 12) were served on the proposed intervener on 14 September 1998 (see the letter marked as exh 'P8' of encl 34). While the third order in encl 30 dated 18 May 1999, to be precise it was a xerox copy of the draft order which was approved by the court, was served on the proposed intervener on 18 June 1999 (see the letter marked as exh 'P11' of encl 34). All these material facts were set out in encl 34 and they were not challenged nor disputed and they

must be deemed to be admitted as the proposed intervener chose not to file any affidavit in reply to encl 34 (*Abdul Razak bin Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287). Relying on all these facts, En Ibrahim bin Hashim rightly submitted that there was delay in filing encl 28 for the purpose of intervening. On the question of promptitude in filing an application to intervene, En Ibrahim bin Hashim referred to a number of authorities and I will, out of deference to him, refer to them accordingly.

In *Tai Choi Yu v Syarikat Tingan Lumber Sdn Bhd* [1998] 4 MLJ 275 CA, Shaik Daud JCA delivering the judgment of the Court of Appeal had this to say at pp 277–278 of the report:

> Next is, when should such an application be made. Although O 15 r 6(2) states that such an application could be made 'at any stage of the proceedings', this does not mean that such an application can be made after final judgment had been entered. In *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng* & Ors [1990] 3 MLJ 254, the court held that O 15 r 6 only applies to proceedings where the substitution of any of the parties to the cause or matter is made before final judgment. In that case, the application was made after a default judgment had been finalised. See also *United Asian Bank Bhd v Personal Representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327. A default judgment once perfected is a final judgment. See the case of *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252, which held that a default judgment which had been perfected is a final judgment and the court there refused to exercise its discretion under O 15 r 6(2) of the RHC to remove the first plaintiff on the ground that he had no cause of action against the second and third defendants in the writ against whom judgment in default of defence had been entered and perfected.

Further down the same page of the same judgment, his Lordship said:

> It is settled law that before the court can grant leave to intervene, the applicant must show that he has an interest directly related to the subject matter of the action. Interest here means a legal interest not a mere commercial interest. Therefore, a mere commercial interest in the outcome of the action is not sufficient. In *Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984] 1 WLR 452, Kerr LJ in the Court of Appeal held at p 460 as follows:
>
> > 'In my view, the rule requires some interest in the would-be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough.'
>
> This principle was applied in a number of Malaysian cases namely; *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1989] 2 MLJ 298 and *Lee Meow Lim v Lee Meow Nyin (t/a Cheong Fatt Merchant), Nabisco Brands (M) Sdn Bhd, Intervener* [1990] 3 MLJ 123 and the *Federal Court case of Eh Riyid v Eh Tek* [1976] 1 MLJ 262.
>
> Under these circumstances, has the appellant shown that he has a legal interest to interfere in the proceedings? Here, the NTT themselves had admitted the debt and at a Board meeting called for by the appellant himself, it was resolved by a majority that the company admit the debt and take no further step to either defend the action or oppose the winding up proceedings as they were insolvent. The appellant in his affidavit avers that he was merely

a minority shareholder of NTT. The law is clear that a mere shareholder, a fortiori, a minority shareholder has no interest, legal or equitable, in the property of a company (see *Macaura v Northern Assurance Co Ltd & Ors* [1925] AC 619 at p 626.)

In *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 at p 256, Gunn Chit Tuan J (as his Lordship then was) said that:

> Order 15 r 6 of the Rules is a rule which is meant to prevent an action from being defeated by the misjoinder or non-joinder of plaintiffs or defendants and allows, subject to certain principles, for the addition, substitution or striking out of persons as plaintiffs, similarly of defendants, intervention of persons not parties to the action and for misnomer. But the power of the court to grant such amendment under that rule is discretionary and I agreed with counsel for the defendants that O 15 r 6 must necessarily only apply to proceedings where the substitution of any of the parties to the cause or matter was made before final judgment. In this case it did not apply as the plaintiff had already signed judgment in default of defence.

In *United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327, Mahadev Shankar J (as he then was) said at p 335 of the report:

> I hope enough has been said to demonstrate to conclusion that this purported intervention should never have seen the door of this court.
>
> Intervention to be legitimate must qualify with the conditions prescribed by O 15 r 6(2)(b)(i) or (ii) of the Rules of the High Court 1980.
>
> It may be permitted at any stage of the proceedings. This means it must be applied for before the final order is made, not after it has been perfected and extracted.

In Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors [1989] 1 MLJ 252 at p 254, Chong Siew Fai J (as he then was) said:

> For the plaintiffs it was contended that even if a party had been wrongly or improperly made a co-plaintiff, he could be removed and the proper party added. Reliance was placed on O 15 r 6(2) and the case of The Duke of Buccleuch [1892] P 201; 40 WR 455. The addition of a party under O 15 r 6(2)(b) may be made in order that all matters in dispute may be effectually and completely determined and adjudicated upon. The court may also add as a party any person between whom and any party to the cause or matter there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the court's opinion, it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. Furthermore, the move to remove and/or to add parties may be on application or on the court's own motion. In *The Duke of Buccleuch*, removal and addition of parties were allowed where the judgment was not final in that damages had yet to be assessed. In our instant case, the default judgment, which had been perfected, was, having regard to its terms, a final judgment. No formal or proper application under O 15 r 6(2) was made. The relief was suggested on behalf of the plaintiffs in the course of arguing the defendants' present application to set aside the judgment. Having regard to all the facts and circumstances including the point on mesne profits which will be dealt with next, I do not

A consider it a fair and proper case for the court on its own motion to exercise the discretion by granting the relief to the plaintiffs as proposed.

Gopal Sri Ram JCA in Tradium Sdn Bhd v Zain Azahari bin Zainal Abidin & Anor [1995] 1 MLJ 668 (CA), speaking for the Court of Appeal at pp 673–674 spoke of intervention in these words:

B Continuing with his argument, Hj Sulaiman submitted that it was a matter of discretion and that several factors weighed heavily against the applicant. These included, but were not limited to the following: (1) the applicant's failure to apply at the earliest opportunity to be added as a party; (2) the availability of the alternative course of applying to intervene in the second respondent's appeal, subject, of course, to the exercise of discretion of this C court in such event; (3) the delay in coming before us; and (4) the making of a conscious election to make a limited intervention instead of choosing to play the role of an added respondent to the substantive motion.

I think that there is merit in the submission made on behalf of the first respondent. The applicant admittedly did not wish to face an order for costs. Nevertheless, while enjoying that protection, it attacked the first respondent's D arguments before the judge. In my view, the applicant was no better than a sniper who, whilst concealed and protected by the foliage in which he hides, proceeds to take pot-shots at his unsuspecting opponent. He was not prepared to take on all the risks of a full battle and, when the event went against him, decided to change his role. Ought he to be permitted to do this? I think not: for both principle and authority are against him.

E At this juncture, it is germane to mention and highlight that the facts in *Pegang Mining* and that of *Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor* are poles apart from the present case. In *Pegang Mining*, their Lordships of the Privy Council were concerned solely with the substitution of parties to the appeal that was made by the F Federal Court by way of an interlocutory order. Lord Diplock speaking for the Privy Council at p 56 of the report had this to say:

In their Lordships' view the jurisdiction of the Federal Court of Malaysia to add the contractor as a party to the appeal does not turn upon the technical distinction between a leasehold interest and a licence to enter and work the minerals. His interest, in their Lordships' view, is sufficiently direct to give the G court jurisdiction to add him as a party.

Put in another way, in *Pegang Mining*, the contractor was added as a party to the appeal by the Federal Court before the appeal was disposed off. Similarly, in *Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corporation Bhd & Anor*, the trial had yet to proceed and the appellants H applied to intervene. In the present case, the orders have been finalized.

The argument advanced by En Ibrahim bin Hashim was quite simple and thought provoking: that the proposed intervener made the application in encl 28 after final judgment had been entered against the defendant. It was vigorously argued that encl 28 was made too late in the day and it I should not therefore be entertained.

Mr Lambert Rasa-Ratnam took exception to the arguments advanced by En Ibrahim bin Hashim. A submission was advanced by Mr Lambert

Rasa-Ratnam to the effect that the submission by En Ibrahim bin Hashim was said to be wholly misplaced on the facts. He submitted that encl 28 was not an application to intervene for the purpose of setting aside or varying the judgment dated 27 November 1998 as seen in encl 21 that the plaintiff obtained against the defendant. He submitted that encl 28 was in fact an application for the purpose of setting aside or varying the orders as seen in encls 7, 12 and 30 in so far as they were directed against the proposed intervener.

What was the judgment that was obtained on 27 November 1998 all about? A reproduction of that judgment had been made in the early part of this judgment and that judgment found expression in encl 21. There was thus no necessity at all to reproduce encl 21 and it was clear as crystal from the reading of encl 21 that the plaintiff had obtained judgment against the defendant for the sum of RM11,097,000 together with interest at the rate of 8% per annum on the judgment sum from the date of the writ till full payment and costs to be ascertained. That would be the magnitude of the misdeeds perpetrated by the recalcitrant defendant. Within a short span of time the defendant had misappropriated RM11,097,000 from the plaintiff — a feat that shook the town of Johor Bahru transcending to the shores of tiny Singapore and reverberating back to Kuala Lumpur, the capital of Malaysia.

The proposed intervener's attempt to justify intervention based on the cases of *Hong Leong Finance Bhd v Staghorn Sdn Bhd* [1995] 2 MLJ 847 and *The Duke of Buccleuch* (1892) P201 can be described as tenuous in the extreme. Both these cases can never assist the proposed intervener. In the former case, the Court of Appeal set aside the High Court order granting leave to intervene because in the words of NH Chan JCA at p 850 of the report: 'The court would have had no jurisdiction thereafter to make any order under O 15 r 16(2) of the RHC. The proceedings came to an end upon the issuance of the certificate of sale on 18 February 1992, and therefore the order for intervention which was made on 30 January 1995, or the summons for leave to intervene which was filed on 4 December 1993, had not been made or issued 'at any stage of the proceedings' as required by O 15 r16(2) of the RHC.' In *The Duke of Buccleuch* there was still the question of assessment of damages that was pending which materially and factually differed from the present case where the question of assessment of damages did not arise at all. As demonstrated, the default judgment in encl 21 that the plaintiff obtained against the defendant was a final judgment and the present exercise was not for assessment of damages but rather for enforcement of the final judgment legally obtained from this court. On the authorities of *United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors* and *Wee Tiang Kheng & Ors v Ngui Nii Soon & Ors*, the application of the proposed intervener in encl 28 stood on weak and flimsy ground. In the former case, Shankar J (as he then was) refused intervention as the final order had been perfected and extracted. In the latter case, Chong Siew Fai J (as he then was) also refused intervention as the default judgment had been perfected and became a final judgment.

A No legal interest shown by the proposed intervener

I have alluded to the correct test propounded by Lord Diplock in Pegang Mining. The contractor who had a legal interest in the case of Pegang Mining was added as a party by the Federal Court and Lord Diplock agreed that the contractor's interest was sufficiently direct to give the Federal B Court jurisdiction to add him as a party. Basically, there must be in existence a legal interest before the proposed intervener can be allowed to intervene. But Mr Lambert Rasa-Ratnam submitted to the detriment of the proposed intervener when he said that:

> C The proposed intervener has no interest or involvement in the dispute between the plaintiff and the defendant. The proposed intervener also has no interest in any shares owned by the defendant.

That being the case, the application in encl 28 must surely fail. To rely on the correct test as proposed by Lord Diplock in *Pegang Mining* without first establishing actual interest would be an act of futility. That was my judgment and I so hold accordingly.

D

The *Supreme Court in Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis* [1991] 2 MLJ 27 applied *Pegang Mining* to construe O 15 r 6 of the RHC and held that the respondent had a legal right to intervene. This was what Gunn Chit Tuan SCJ (as he then was) had to say at p 28 of the report:

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> In our present case, we considered that the respondent, who had undertaken to pay the debt of the judgment debtors, would not only be affected in his legal rights but also in his pocket in that he would be bound to foot a larger bill if the judgment in default, which includes excessive interest, is not set aside. Both the learned judge and the senior assistant registrar were therefore right in exercising their discretion to allow the respondent to intervene in the said F suit between the appellant and the judgment debtors, and the learned judge had correctly dismissed the appellant's appeal to him. That was the reason why we confirmed the High Court's decision and also dismissed this appeal to us with costs.

In *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63 SC, the G Supreme Court agreed with the learned trial judge that the intervener had a direct interest in the matter and should therefore be allowed to intervene in the proceedings. Mohamed Yusoff SCJ delivering the judgment of the Supreme Court applied the case of Pegang Mining and at p 65 of the report his Lordship had this to say:

> H It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgment in the action but not if his commercial interests alone would be affected: per Lord Diplock in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 at pp 55–56. In that case, the Privy Council had formulated the test to determine whether a party's interests in the matter are 'legal' or merely 'commercial' in the following words (at p 56):
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> I
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> > 'A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by an order which may be made in this action?'

> The answer to that question, as far as the interveners in this case are concerned, is definitely in the affirmative. We therefore hold that the learned trial judge was correct in his decision on this point.

It is apparent that the *Supreme Courts in Arab Malaysian Merchant Bank Bhd v Jamaludin bin Dato Mohd Jarjis* and in *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* applied *Pegang Mining* in their judgments and at the same time insisted that in order to intervene the interveners must have legal interests. In the present case, however, the proposed intervener failed to show a legal interest in these proceedings. Furthermore there was concession on the part of the proposed intervener when Mr Lambert Rasa-Ratnam conceded that:

> The conclusion drawn by the plaintiff is that the effect of the section (referring to s 2 of the Securities Industry (Central Depository) Act, 1991) is that the proposed intervener is a bare trustee of the defendant's securities. This, with respect, is not disputed.

This meant that the proposed intervener had no 'legal interests' whatsoever in regard to these proceedings. In *Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984] 1 WLR 452 (CA), Kerr LJ had this to say at p 460 of the report which must be vigorously applied in adjudicating encl 28:

> In my view the rule requires some interest in the would-be intervener which is in some way directly related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough.

and when so applied, encl 28 must fall like a deck of cards.

The Securities Industry (Central Depository) Act 1991 ('the Act')

This is certainly an interesting piece of legislation. Section 43 of the Act enacts as follows:

> (1) Except as provided in this Act, no director or officer of a central depository or an authorised depository agent, whether during his tenure of office or during his employment or thereafter, and no other person who has by any means access to any information or document whatsoever relating to the affairs of any of the depositors, and in particular, relating to their securities accounts, shall give, divulge, reveal or otherwise disclose such information or document to any person.
>
> (2) No person who has any information or document which to his knowledge has been disclosed in contravention of sub-s (1) shall in any manner howsoever disclose the same to any other person.
>
> (3) A person who contravenes this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding three million ringgit or to imprisonment for a term not exceeding five years or to both.

and basically it deals with the duty to maintain secrecy imposed on its director or officer not to simply divulge, reveal or disclose information or document to any person. An argument was advanced for the proposed intervener to the effect that the orders contravened s 43 of the Act. It was also argued that compliance with the orders by the proposed intervener

would place the latter in clear breach of s 43(1) of the Act and would expose the proposed intervener, its director and its officer to criminal liability and the penalty provided for under s 43(3) of the Act. By way of an answer, reference must be made to the case of *The Attorney General of Hongkong v Zauyah Wan Chik & Ors and another appeal* [1995] 3 CLJ 35, a decision of the Court of Appeal. There the primary issue that arose was whether the respondents were duty bound in law to give evidence as required, and if so, whether the disclosure of confidential information, if made by them in the proceedings in Hongkong, could expose them to any liability in Malaysia. The respondents were bank officers who were governed by s 97 (1) of the Banking Financial Institutions Act 1989 (BAFIA), a provision similar to our s 43 of the Act, in regard to secrecy. Section 97 of the BAFIA enacts as follows:

> Secrecy
>
> (1) No director or officer of any licensed institution, whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.
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> (2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.
>
> (3) No person who has any information or document which to his knowledge has been disclosed in contravention of sub-s (1) shall in any manner howsoever disclose the same to any other person.

and the punishment section would be governed by s 103 of the BAFIA. Gopal Sri Ram JCA writing a separate judgment for the Court of Appeal held that the first to the third respondents have legitimate excuse or reason for breaking confidence because they were bound by law to make the disclosure. No action therefore will lie against them in respect of the disclosure by them of confidential information made in the course of giving evidence before the learned judge in this country. His Lordship at p 45 of the report had this to say:

> In *Television Broadcasts Ltd. & Ors v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346, my learned brother Chan J, (as he then was) reviewed several authorities and, in my respectful opinion, rightly held that the effect of the section is to do away with the privilege against self-incrimination that is part of English common law. Suzanne McNicoll in her treatise on the Law of Privilege, (1992 edition), provides the following comprehensive statement of the rule, attributing it to the formulation of it by *Lord Goddard in Blunt v Park Lane Hotel Ltd* [1942] 2 ICB 253:

'It is a fundamental principle of the common law that, in civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly, to a criminal conviction the imposition of a penalty or the forfeiture of an estate.'

As observed, s 132 has excluded the operation of this doctrine in our jurisprudence. The section applies where a court in this country is recording evidence in municipal proceedings or in aid of proceedings pending before a foreign tribunal. It is to be applied in this way. If a witness is asked a question the answer to which may expose him to one or more of the consequences envisaged by the section, the court must direct the witness to answer the particular question, explaining to him that he is under compulsion to provide the answer and explain to the witness that any answer he may give cannot be used as the basis of criminal liability.

In the context of the present appeals, the first and second respondents are not excused, while giving evidence before the learned Judge form declining to answer any relevant question asked of either of them. However, once it appears to the learned Judge that the answer to any particular question may result in one or more of the consequences described in s 132(1), he must carry out the exercise set out in sub-s (3) thereof. In this way, neither the first, second nor third respondent may be held criminally liable for the answers they provide whether in examination in chief or under cross-examination.

I cannot see that a different result would ensue if these witnesses were to give evidence in Hong Kong upon those matters covered by the letters of request. In the case of criminal liability, s 97 of the BAFIA is not expressed to have extraterritorial effect. Therefore, a disclosure made in contravention of it cannot found the basis of criminal liability in this country.

Writing a separate judgment, NH Chan JCA held that by sub-s (1) s 132 of the Evidence Act 1950, a witness in this country was bound to answer any relevant question put to him, whether in examination-in-chief, cross-examination or re-examination. The legislature has thus taken away the common law privilege of not answering on the ground of self-incrimination. NH Chan JCA further held that although a witness can be compelled by the court to answer to the questions put to him notwithstanding that such answers may criminate him, by sub-s (2) of s 132, any such answer will not subject him to arrest or prosecution except a prosecution for giving false evidence by that answer. By giving evidence before a Judge in this country under the letters of request, the witness, therefore was protected by s 132(2) from arrest or prosecution. It follows that those answers which have been protected under s 132(2), if repeated in a Court of the country which issued the letters of request, would be similarly protected as though the evidence was taken in this country. This is because those answers had originated in this country where the protection afforded by the subsection applies. NH Chan JCA continued further and his Lordship held that s 132(2) only protects the witness from the consequences of giving incriminating evidence in criminal proceedings but not in respect of civil proceedings. The answers are therefore admissible in civil proceedings brought against the witness. But in the instant case, the answers are not going to be of a kind or nature that will admit of any personal liability either in contract or in tort against the witnesses, and therefore there was no risk of any civil proceeding being

brought against the witnesses because of those answers. In any case, his Lordship NH Chan JCA was of the view that the witnesses in the present case have legitimate excuse or reason for breaking confidence because, at the time when the questions were put to them, they were bound by law, namely s 132(1) of the Evidence Act, to make the disclosure. As the law now stands, where the disclosure was made in obedience to the law which required it to be made, no duty of care arises. At pp 53–54 of the report, his Lordship NH Chan JCA had this to say:

> The privilege against self-incrimination is a rule of the common law. In this country, s 132(1) of the Evidence Act 1950 has abolished the privilege: see *Television Broadcasts Ltd v Mandarin Videos* [1983] 2 MLJ 346; [1948] FSR 111. In *Reg v Scott* [1856] Dears & B47; 169 ER 909, Lord Campbell CJ said (p 59):
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> > 'The defendant's counsel relies upon the great maxim of English law "nemo tenetur se ipsum accusare." So undoubtedly says the common law of England. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be criminated. ... The maxim of the common law therefore has been overruled by the legislature.'
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> In Malaysia the legislature has taken away the privilege of not answering on the ground of self-incrimination, so that, a witness in this country cannot refuse to answer to the questions put to him. This is what s 132 of the Evidence Act 1950 says:
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> (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.
>
> (3) Before compelling a witness to answer a question which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of sub-s (2).
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> Subsection (1) has abrogated the privilege. It says that a witness is obliged to answer any question put to him in any civil or criminal proceeding which is relevant to the matter in issue and that he cannot refuse to answer on the ground of self-incrimination. By this subsection, a witness is bound to answer any relevant question put to him whether in examination in chief, cross-examination or re-examination.
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> By sub-s (2) any answer by which a witness is compelled by the court to give will not subject him to arrest, prosecution or be used against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

Sub-s (3) merely says that the court, before compelling the witness to answer, has to explain to him what sub-s (2) means and it is that his answers, even though they may incriminate him, will not subject him to arrest or prosecution or be used against him in any criminal proceeding. A

By giving evidence before a judge in this country under the letters of request, the witness is protected by s 132(2) from arrest or prosecution for his answers which are inadmissible as evidence against him in criminal proceedings. It follows from this that those answers which have been protected under s 132(2), if repeated in a Court of the Country which had issued the letters of request, would be similarly protected as though the evidence was taken in this country. This is because those answers had originated in this country where the protection afforded by the subsection applies. It also follows that such protection would extend to answers obtained under cross-examination. B C

Although a witness can be compelled by the court to answer to the questions put to him even though the answers 'will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person,' he will only be protected under sub-s (2) from arrest or prosecution or his answers being used in criminal proceedings brought against him. Section 132(2) does not protect him from his answers being used against him in civil proceedings. This is how it was put by Lord Campbell CJ in *Reg v Scott* (p 60): D

> 'When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment.' E

In this country, s 132(2) expressly protects the witness from the consequences of giving incriminating evidence in criminal proceedings only. There is no protection from the consequences of giving such evidence in civil proceedings. F

At p 55 of the report of the same judgment, NH Chan JCA continued in these words:

> But what if an action is brought against the witnesses in this country for breach of confidence for the disclosures made in their answers to the Court which the witnesses were bound by law to furnish? It is a defence to such an action that there was just cause or excuse for the disclosure: see *Fraser v Evans* [1969] 1 QB 349. This is what Lord Denning MR said (p 362): G
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> > '*The Sunday Times* say that in any event they have just cause or excuse for publishing. They rely on the line of authority from *Gartside v Outram* (1856) 26 LJ Ch 113 to the latest case, *Initial Services Ltd v Putterill* [1968] 1 QB 396; [1967] 3 WLR 1032; [1967] 3 All ER 145, CA. They quote the words of Woods VC that (26 LJ Ch 113 at p 114), "there is no confidence as to the disclosure of iniquity." I do not look upon the word "iniquity' as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence.' H
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> The witnesses in the present case have legitimate excuse or reason for breaking confidence because at the time when the questions were put to them, they were bound by law, namely, s 132(1) of the Evidence Act, to make the disclosures. I

To round it up, at p 56 of the report of the same judgment, NH Chan JCA said:

> There is no duty of confidence where the disclosure is made in obedience to the law which required it to be made. In the present case, the duty of confidence is outweighed by the requirements of s.132(1) of the Evidence Act 1950.

Siti Norma Yaakob JCA concurred with the decisions and the reasons advanced by Gopal Sri Ram JCA and NH Chan JCA in that case.

Mr Lambert Rasa-Ratnam criticised the decision of the Court of Appeal in *The Attorney General of Hongkong v Zauyah Wan Chik & Ors and another appeal.* He submitted that the Court of Appeal found that the information sought to be disclosed would not contravene s 97(1) of the BAFIA (which is similarly worded with our s 43(1) of the Act) and therefore would not expose the parties concerned to criminal liability because s 97(1) of the BAFIA has no extra-territorial effect. The information that was sought to be disclosed was to be disclosed in Hong Kong. Mr Lambert Rasa-Ratnam further submitted that the Court of Appeal then went on to consider, in the light of the finding that s 97(1) of the BAFIA was of no application, the question of whether such disclosure was prohibited by a contractual duty of confidence implied from a confidential relationship between a banker and a customer and the Court of Appeal found that this implied contractual duty was subordinate to the duty to disclose if required by law. Mr Lambert Rasa-Ratnam stressed that the application for disclosure before the High Court judge was made under s 6 of the Banker's Book (Evidence) Act 1949 and so he submitted that the decision of the Court of Appeal must be read in the context of a possible breach of the implied contractual duty.

I am bound by the decision of the Court of Appeal in the case of *The Attorney General of Hongkong v Zauyah Wan Chik & Ors and another appeal* That was a decision of three eminent Judges of the Court of Appeal and their decision was very apt and appropriate to the facts of that case. The law distilled from that case must be vigorously applied to the facts of the present case. The fear of the proposed intervener in the light of the interpretation of s 132(1) of the Evidence Act, 1950 was certainly unfounded. The disclosure was to be made in Malaysia and not in Hong Kong and this made it even stronger for the proposed intervener to have a 'legitimate excuse or reason for breaking confidence.' The veil of secrecy was clearly superficial. Section 43 of the Act must be read together with s 132(1) of the Evidence Act 1950 and the interpretation accorded to it by the Court of Appeal in *The Attorney General of Hongkong v Zauyah Wan Chik & Ors and another appeal.* His Lordship N H Chan JCA spoke of 'obedience to the law' in his judgment and this phrase though generally worded must be construed generously to extend to and include an order from the Court.

The duty to keep confidence must now be seen in a wider context and that would be in the context of the interest of the public. This principle of law can be distilled from the case of *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1972] RPC 743 at 746 and this very case was cited

and adopted favourably by Gopal Sri Ram JCA in *The Attorney General of Hongkong v Zauyah Wan Chik & Ors and another appeal* where at p 46 of the report his Lordship said:

> The duty to keep confidences whether of a personal or commercial nature is essentially part of equity jurisprudence, although, more recent authority supports the foundation of the doctrine on the wider concept of public interest. (See *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1972] RPC 743 at p 746, per Lord Denning MR, reversed on other grounds in [1974] AC 133).

It was certainly in the public interest that disclosure must be made and such disclosure would be governed by the requirements of s 132(1) of the Evidence Act 1950. It is germane to mention that *The House of Lords in Norwich Pharmacal Co & Ors v Commissioners of Customs and Excise* (supra) which was reported in [1973] 2 All ER 943 reversed the decision of the Court of Appeal as reported in [1972] 3 All ER 813. The headnote of *Norwich Pharmacal Co and Others v Commissioners of Customs and Excise* (supra) bore the following summary:

> Even if the respondents had been right in treating the information relating to the identity of the importers as confidential, there was no statutory provision which prohibited the court from ordering discovery for the purpose of legal proceedings if the public interest in the proper administration of justice required it. In the circumstances the public interest in such confidentiality as might attach to the names and addresses of the importers was outweighed by the interests of justice in disclosure for the purpose of the appellants' intended proceedings.

Lord Reid, Viscount Dilhorne and Lord Cross of Chelsea in *Norwich Pharmacal Co v Commissioners of Customs and Excise* were unanimous and they all agreed that the order of a court of law in regard to disclosure would be the best alternative to resort to. For instance at p 949 of the report, Lord Reid had this to say:

> If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court at the expense of the person seeking the disclosure. The court will then only order discovery if satisfied that there is no substantial chance of injustice being done.

That the court has the absolute power to order disclosure can never be doubted. There is no statutory provision which prohibits this court from ordering disclosure. Nowhere in the Act nor in s 43 of the Act is there a provision that prohibits this court from ordering disclosure. For the aforesaid reasons, effect must be given to the orders. The proposed intervener must obey and fulfil their obligations under the orders bearing in mind that they have committed contempt. Contempt is certainly a subject that touches on many areas of the law and the present case is not an exception. The law of contempt plays an important role in advancing and protecting the administration of justice in our country. Instead of filing encl 28, the proposed intervener should obey the orders to the very letter. Section 132(1) of the Evidence Act 1950 would certainly whittle down the

effect of s 43 of the Act. A contempt of court is a continuing process, it continues day by day until the orders have been obeyed. That would be the magnitude of the contempt of court.

The court can look at other provisions of the Act

Section 43 of the Act cannot be viewed in isolation. The courts are free to look at the other sections of the Act so as to arrive at a just decision. In *Coramas Sendirian Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 AMR 425 (SC), Edgar Joseph Jr SCJ speaking for the Supreme Court had this to say at p 435 of the report:

> The issue, therefore, appeared to us to be purely and simply one of construction, and in the ultimate resort, must be determined upon the actual words used in ss 45(1) and 125, read not in vacuo but as occurring in a single complex statute, in which one part may throw light upon another.

Lord Davey in Canada Sugar Refining Co v The Queen (1898) AC 735, at p 741 aptly said that:

> Every clause of a statute should be construed with reference to the context and other clauses in the Act, so far as, possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

The court in *Arataki Honey Ltd v Minister of Agriculture and Fisheries* [1979] 2 NZLR 311 at p 316 held that:

> The Act must be read as a whole and that all sections must be read bearing in mind the provisions of other sections. It is not necessary for one section to refer specifically to another section before the first section can be construed as being subject to or overriding or in some other way qualifying the other section.

Thus, with these principles in mind it would be appropriate to say that s 43 of the Act must be read in conjunction with ss 21, 41 and 45 of the Act and when so read the proposed intervener cannot be excused from not complying with the orders. Section 21 of the Act speaks of bare trusteeship and it is worded as follows:

> Central depository deemed a bare trustee 21. For the purposes of para 6A(9)(a) of the Companies Act 1965, a central depository or its nominee company shall, in relation to deposited securities which are registered in its name, be deemed to be a bare trustee.

and it summarises the position of the proposed intervener. The learned author by the name of Loh Siew Cheang in a book entitled *Corporate Powers — Controls, Remedies and Decision-Making* at p 181 said:

> A bare trustee is a person who does not have any right at all to determine how the interest of the beneficiary is to be dealt with, such as a company providing nominee services or who has no say in the utilization of powers attaching to the shares.

and that would be the intended role of the proposed intervener. Section 41(1)(b) of the Act enacts as follows:

(1) A central depository may specify that any deposited security in a securities account as being in suspense in any of the following circumstances:

(b) where the central depository has been served with an order of a court of competent jurisdiction prohibiting any dealing in respect of a deposited security;

and it must be read in the context of the affidavit evidence in encl 34. At paras 3 and 4 of encl 34 and at exhibit marked 'P5', the proposed intervener suggested that the defendant's account would be suspended on request. The plaintiff made the request and the proposed intervener then responded and said that they require a court order (see para 11 of encl 34 and the exhibit marked as 'P7'). After obtaining the relevant court order, the proposed intervener refused to comply. To date, the proposed intervener have yet to comply with the orders bearing in mind that these court orders were 'an order of a court of competent jurisdiction prohibiting any dealing in respect of a deposited security' as envisaged in s 41(1)(b) of the Act.

Section 45(1)(c) of the Act enacts as follows:

Permitted disclosures

(1) Subject to the provisions of this Act, nothing in any other law or s 43 shall entitle any person to refuse to disclose any information or document — (c) for the purpose of instituting or, in the course of, any civil proceedings — (i) between a central depository or an authorized depository agent and a depositor relating to the securities account of the depositor; or(ii) between a central depository or an authorized depository agent and two or more parties making adverse claims to securities or monies in the securities account of the depositor, where the central depository or authorized depository agent seeks relief by way of interpleader;

and s 45 (2) of the Act enacts as follows:

Subject to the provisions of this Act, nothing in s 43 shall entitle any person to refuse to disclose any information or document to the Minister or the Commission if the disclosure is required in the interests of investors or in the public interest.

Now, the heading to s 45 of the Act bears the caption 'Permitted Disclosures' and in the words of Gopal Sri Ram JCA in the case of *Keet Gerald Francis Noel John v Mohd. Noor @ Harun bin Abdullah & Ors* CLJ JT (2) 1995, particularly at p 11 of the report:

Headings, unlike marginal notes, are permissible guides to the interpretation of statutes: *Toronto Corporation v Toronto Rly* [1907] AC 315.

and it is correct to say that a heading cannot be ignored as it can constrain the scope of the section. *Shaw LJ in Dixon v British Broadcasting Corpn* (1979) 2 All ER 112, 116 remarked that 'it is requisite to look at the heading.' That being the case, on reading the heading that appears in s 45 of the Act, it is crystal clear that it leans in favour of disclosure and it greatly constrains s 43 of the Act. In my judgment, as a bare trustee (s 21 of the Act) the proposed intervener was certainly empowered to suspend (s 41 of the Act) as well as disclose (s 45 of the Act) the information as required by

A the orders. This was my judgment and I so hold accordingly.

The plaintiff's right to trace and recover

This brings to mind the case of *Bankers Trust Co v Shapira & Ors* [1980] 3 All ER 353 (CA). where the plaintiff there sought to trace money paid B under a mistake of fact induced by fraud. Lord Denning MR writing a separate judgment had this to say (see pp 357–358 of the report):

> Having heard all that has been said, it seems to me that Mustill J was too hesitant in this matter. In order to enable justice to be done, in order to enable these funds to be traced, it is a very important part of the court's armoury to be able to order discovery. The powers in this regard, and the extent to which C they have gone, were exemplified in *Norwich Pharmacal Co v Customs and Excise Comrs* [1973] 2 All ER 943, [1974] AC 133. The customs authorities were perfectly innocent: but they had to disclose the names of infringers of patents whose goods had passed through their hands. Lord Reid said ([1973] 2 All ER 943 at p 948, [1974] AC 133 at p 175):
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> D > 'They seem to me to point to a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.'
>
> Lord Reid was referring to the views expressed by *Lord Romilly MR and Lord Hatherly LC in Upmann v Elkan* (1871) LR 12 Eq 140 at p 145, 7 Ch App 130 E at p 133.
>
> So here Discount Bank incur no personal liability: but they got mixed up, through no fault of their own, in the tortious or wrongful acts of these two men; and they come under a duty to assist Bankers Trust by giving them and the court full information and disclosing the identity of the wrongdoers. In this F case the particular point is 'full information'.
>
> This new jurisdiction must, of course, be carefully exercised. It is a strong thing to order a bank to disclose the state of its customer's account and the documents and correspondence relating to it. It should only be done when there is a good ground for thinking the money in the bank is the plaintiff's money, as for instance when the customer has got the money by fraud, or G other wrongdoing, and paid it into his account at the bank. The plaintiff, who has been defrauded, has a right in equity to follow the money. He is entitled, in Atkin LJ's words, 'to lift the latch of the bankers' door: see *Banque Belge Pour L'Etranger v Hambrouck* [1921] 1 KB 321 at p 335. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship H between him and the bank: see *Initial Services Ltd v Putterill* [1967] 3 All ER 145 at p 148, [1968] 1 QB 396 at p 405. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents, for that is the only way of tracing the money or of knowing what has happened to it: see *Mediterranea Reffineria Siciliana Petroli SpA v Mabanaft GmbH* [1978] Court of Appeal transcript 816. So the court, in order to give effect to equity, will be I prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery; and the documents, once seen, must be used solely for the purpose

of following and tracing the money, and not for any other purpose. With these safeguards, I think the new jurisdiction, already exercised in the three cases I have referred to, should be affirmed by this court.

Applying this principle, I think the court should go to the aid of Bankers Trust Co It should help them follow the money which is clearly theirs, to follow it to the hands in which it is, and to find out what has become of it since it was put into Discount Bank (Overseas) Ltd.

If the courts were to wait until the first and second defendants were served goodness knows how many weeks might elapse. Meanwhile, if some of it has got into the hands of third persons, they may dispose of it elsewhere. It seems to me that the fact that the first and second defendants have not been served does not deprive the court of its power to make such an order. These two men have gone out of the jurisdiction in circumstances in which it is clear that the court should do all it can to help the innocent people to find out where their money has gone.

In those circumstances, while expressing our indebtedness to both counsel, I would allow the appeal and make the order as asked in the notice of appeal.

Likewise here, the plaintiff, who was defrauded, had a right in equity to follow the money. The 'latch' of the proposed intervener's door must be opened and it cannot be bolted from within. Disclosure must be the order of the day.

Conclusion

For the reasons adumbrated above, I dismissed the proposed intervener's application in encl 28 with costs. The proposed intervener is hereby ordered to comply fully with the orders of this court as seen in encl 7 (dated 23 May 1998), in encl 12 (dated 1 June 1998) and particularly with encl 30 (dated 18 May 1999).

Application dismissed.

Reported by Andrew Christopher Simon